Orchard Lake is the largest of the lakes which lie on the north shore of the Grand River valley. The most prominent feature of the lake is the bluff of variegated sand and limestone rock known as the Lake View Grove and Barrens. Leather Wood Point is a beautiful and picturesque headland, which terminates the eastern approach to the lake, and is covered with a rich and lasting verdure.

Clay and Gravel of the Grand

Yale College
1814

Lectures

on

Law

delivered

by

the Hon. Tapping Reeve

and

James Gould Esquire

at

Litchfield

Connecticut

in the Years

1811 & 1812.

Vol. I.

Title. 1st

Page

Municipal Law ... 1

Parent and Child ... 49

Master and Servant — Domestic ... 211

Guardian and Ward — Relation's ... 318

Husband and Wife ... 337

Exec^rs and Adm^rs ... 418

Torts. 2. Vol. Page

Sheriff and Jailer ... 1

Bailment, under which are ...

Inns and Innkeepers ...

Contracts including ...

Actions in Contract and ...

Defences to Actions on Contract ...

Municipal Law

James Fenlo Esq.

Law in its most general sense, is a rule of action 22d Oct. 1811.

1. Lecture.

4th May 1812

Municipal Law which is now about to be treated of is defined to be a rule of civil conduct prescribed by the supreme power of the state commanding what is right, and prohibiting what is wrong." 1 Bl. Com.

It is called a "rule" because it is the most general and universal thing by the universality it means, that the rule is governed and not governed within its own limits. 1. Bl. 44.

If it is conduct there is differ from natural law which is binding on rational creatures considered as such. Municipal Law regards its subjects as members of Civil Society. 2 Bl. Com.

Provided by this it is meant that no person is punishable and [illegible]

1st

Retrospective Law

[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]

words or significant terms of Art and
always to be construed according to the
acceptation of the profession in that
Art: As in pleading, sale &c of any
words have a known and determinate
signification at Common Law and are
used in a Statute reference is not to be
had to the Common Law to determine their
signification in the construction of the Statute
2. If there are two ways which
fairly seem open to be adopted the con-
text must be consulted to establish
their meaning: So when Laws are made
concerning the same subject matter
they must be construed with a reference
to each other
3. The words of the Law are to be under-
stood with regard to their subject matter
4. The effects and consequences of a diffe-
rent Construction are to be regarded
5. But the Law and Court must endeavour
to find out the reason and spirit of the
Law

6 Mod 65
10 Mod 273
4 Bac 643 n 7
1 Bl R 59

4 Bac 643
632
Hard 426
Ld Ray 1028
Dyer 365
1 Bl R 60
1 Mod 244

1 Bl R 60

Bac Abr
4 Bac 632 59
1 Bl R 61

Municipal Law

Law is to be enforced, and when recourse is had to the rule of construction. From this rule results the Equity of the Law which is thus opposed to Strict the construction of that wherein the Law by reason of its universality is defficient.

But by the Equity of the Law Not Contradicting to be a construction of the Law according to the reason and spirit of it

Division

Municipal Law is divided into two kinds Viz. the Unwritten Law or the Law non scripta, and the Written Law or Lex scripta. the Common includes 1 the Common Law properly so called. 2 particular Customs and 3. particular Laws ofered by in certain places. The Unwritten Law is a customary Law but according to this division the Unwritten Law and the Common Law are not the same. The Common Law is a branch of the Unwritten Law for particular customs which are a branch

of

of the Unwritten Law and not Common Law = It is called Unwritten Law, because its original institution is not set down in writing there being no written or general instrument of it which can be called a Law: it derives all its force and custom The first branch of the Unwritten Law is the Common Law All Unwritten Law is customary Law: The Common Law therefore is a Law founded on Immemorial usage: tis called a general custom: it is called Common because it is common to the whole Kingdom or State = The Common Law depends for its support and authority on immemorial usage: by immemorial usage is meant an universal reception: & is paid no regard to general or particular usage if its non existence can be found in any part of the period of time between the reign of Richard 1.st and the present time. For is the theory of the Law and they only

1 Bl C 64 67

2 Bl C 63 68 77

for a great part of the Common Law has been framed since that time.
But as the original institution of the Common Law was not set down in writing it may be asked what it is to be found? It is preserved in the records of the several Courts of Justice, in Books of Reports and Judicial Decisions and in treatises of learned men upon the Subject. It is then to be found in certain written memorials. Still these memorials are not Law of themselves, but are evidence of the Law. An act of Parliament is Law per se: If those memorials were Law per se a precedent once established, could never be departed from: but they are sometimes overruled and this is a substantial distinction between Unwritten and Written Law.
A precedent is a formed judicial decision on the point in question: nothing short of this can be called a precedent.

The most authentic treatises of learned men can not be considered as place Courts: & a mere opinion of a judge on the bench is no precedent. These treatises & opinions however are prima facie evidence of what is Law: & to the question of precedents much has been said but at length a rule is established that precedents are to be followed unless plainly absurd or unjust. A precedent is not to be overthrown because the reason of it can not be discovered: he that would object to a precedent must himself advance reasons to show that it ought not to be continued as a precedent. the onus probandi lies on the person objecting. This Countries Law was actually enacted and built up by the Courts of Justice, and the Judges in the Courts at Westminster did so. If there is no unwritten Law there can be no such thing as a regular and uniform system of jurisprudence. If the Common Law

East 155
675
1 Bl C 69, 70

are created by the Courts of Justice it would seem that it did not come within the definition of Municipal Law of which the Common Law is a branch because it must be prescribed by the Supreme power: But to this it may be answered, that the Supreme power does acquiesce in it and when any Law is sanctioned by the acquiescence of the Legislature this sanctioned is Law. Mere rules of Common Law are not Law but evidence of what the Law is, they are and how decisions are evidence of immemorial customs.

The second branch of the Municipal Law consists of Particular Customs: the difference between this and the Common Law is explained in it by the terms themselves. A particular Custom is a local usage. This is called particular because it extends only to the Inhabitants of some particular District, and this is the class

1 Bl. Com. 2 Bl. C. 263.

difference between Common Law & particular Customs: as to their general nature. But there are several rules which relate to particular Customs only. 1st. It is a general rule that a particular custom must be specially pleaded as a matter of fact, and the existence of the custom must also be shewn and they, that the case comes within the Custom: And as particular customs are to be specially pleaded, so they are to be tried as matters of fact, and must be traversed and tried by a Jury. Litt. Sec. 265 1 Inst. 175 a 1 Co. 6 - b Doug. 13 R.

But if the Custom has been before tried — and decided — by the same Court it is not to be tried again. The Judges are presumed to know the Custom. 1 Bl. 69.

There are two particular Customs which do not come within the rule: the one the Custom of Gavelkind and Borough English: these must be specially pleaded. Custom & Each time pro- 6 Co. 63 1 Bl. 70

The

Municipal Law

Lex Mercatoria among particular Customs but what Courts can recur, improperly, because the Law Merchant is no local usage. The Lex Mercatoria [illegible] general as particular transactions within the realm: but it is not confined to local limits it is a branch of the Common Law = That it is not a particular Custom obvious. 1st because it is not necessary that it be specially pleaded even if it were a particular custom: 2d The Lex Mercatoria is not to be tried by a Jury, but particular customs are: 3d It is not to be found by Witnesses: Even as to particular Customs. Most it is said that Merchants may be examined as to the existence of Customs & that is meant by it, is that they may inform the Judge, just as the same men as he would consult a Dictionary to find the meaning of words he is not versed in. As to the quality of a Custom

Salk 78.
2 Bac. Abr. 459. 461.
2 Vent 299.
Comb 39.
45
Show 131.

Salk 195.

Show 175
3 Bl. C. 4 367
2 W.C. 459.
461 467
2 Burr. 1078
1092 a 1096.
1 Bl. Re. 298
1 T. Rep 218.
Bunbury 13
98 99
Peake 92
4 C.C.

Municipal Law

or the requisites to make a good custom 2d Lecture
land it is necessary 1. That it be immemorial: 2. Continued or uninterrupted (as the right must have existed): 3. It must have been peaceable & acquiesced in immemorially: 4. It must be a reasonable Custom or rather it must not be unreasonable 5. It must be certain (as intelligible not vague and uncertain): 6. It must be compulsory and 7. Holden 1 Bl C. 67
they must be consistent with each other = It is a general rule that customs 9 Co Rep 58
in derogation of the Common Law are 1 Burr 113-114
to be confined strictly (as they) and 1 Bl C. 75-9
not be extended by analogy or by construction = In England all Customs must 1 Bl C. 75-
pe submit to the Royal Prerogative 76
It has already been affirmed, that the Law
in this Land consisted of three kinds: the
two first have been enquired, and now
the third kind will be enquired

Municipal Law

1 Bl. Com. 74. 7 T.R. 60 63

The third sort of particular customs or Laws are those adopted by Custom and used only in particular Courts. These particular Laws are the Civil and Common Law. These Laws are binding in England by adoption: they are not binding on account of any original intrinsic Authority

1 Bl. Com. 77. 0.3

The Common and Statute Laws in England, so far as they are binding in this Country derive their authority from a similar power i.e. enacting, adopting or using. except when a Statute of England is adopted by a Statute of any of the United States. It is clear that our Courts ought not to neglect the Common Law of England only in those cases, where it is unjust absurd or inapplicable to our Constitution the Common Law of England is prima facie the Common Law of the United States. The reason why this ought to be considered

they

thing is that in general it may have adopted and acted upon as a Law by usage and common consent. It does not pretended that all the Common Law of England is or ought to be adopted in this Country because the rules which arise from the Royal prerogative can not operate here from the nature of the thing: but all that is meant is that the Common Law of England ought to be observed in force except when it is found unjust or unsuitable with our situation.

It has been made a great question whether a Common Law distinct from the Common Law of England can exist in any one or all of the United States or in other words whether an unwritten Law which are unknown to the Common Law of England. The objection pointed against the holding [illegible] of

Peirce

Municipal Law

reception, as that stage are not supported by commercial usage.

So far as the Common Law of England is applicable to our political situation, our Courts are bound to ejpect it. Now it is perfectly clear that every foreign State must have a system of Law of their own peculiar to itself or there would be a failure of justice and the rational and uniformed process of jurisprudence could exist without it: No tribunal in civilized nations would have a Common Law founded on a usage of our own: If we find a Common Law it must be without any reference to the fugitive rule which England has established concerning the reign of Richard I. Our Customs and Usages are old as our Government and as formerly in England a custom of sixty years had a good ufhold this ground we find a Common Law of

Municipal Law

can for our Common Law is of more than Sixty years standing

The Second branch of the Municipal Law is the Law Written or Written Law: by which is meant the Statute Law made by Parliament. 1 Bl 68 1 Coke 20

The Ancient English Statutes are said to be binding in this Country as far as the Common Law is (as they are) prima facie the Law of this Country. The reason why they are so considered is that our Ancestors when they settled this Country brought with them their birth right & such of the Law as was then extant: No sound Country that those Statutes are absolutely binding but that it is right for them to have that Law so far as it was applicable to their situation

The English Books all agree as to this that those Statutes were the Laws of England

Municipal Law

2 Salk 416. 411. 666 1 Bl. R. 1 Bl. 95 Cro. E. 62 2 Ld. Raym. 938 Hardy. 369 Fitz. 12 250. 3 Ld. Raym. 3

The person asserting that modern Eng lish Statutes have any force here but that Colonial Statutes and prima fa cie the Laws of this Country =

It is true however that in fact the great portion of the English Statutes have been adopted in this Country: Many of the Statutes are a part of our Courts of Justice have adopted them. So that what in England is common law may here be and Customary law. So actions on the case and torts are unknown to the Common law: they were created in England by a Statute and adopted in this Country of course =

1 Bl. C. 85

All Statutes are either public or private or general or Special

A public Statute is defined to be one which regards the whole Community. A private Statute is one which re gards private concerns or particular persons: But the application of the

1 Bl. C. 85

Principal Law

distinction is attended with much and frequent difficulty. This definition is by no means a perfect one but perhaps it is as good an one as can be given: Most public Statutes do regard the whole community, as the Statute of Frauds & consequently there is no difficulty here. But in many cases, Statutes relating in particular, and in the terms of them to Classes of men are considered as public Statutes. The rule of discrimination seems to be this viz^t If the class of persons to whom the Statute relates amount (as my Lord Coke says) to a "genus" 'tis a public one, but if it amounts only to a "species" it is a private one: Yet it sometimes happens, that a genus may only be a species of a higher genus: in which case the rule is, if the class of persons contemplated by the Statute will admit of a subdivision into species only

is a public statute but if it consist of a subdivision into individuals only it is a private Statute: So a Statute
1 Coke 76 a b. made relating to the Mechanics, is a
12 Vin. 49 b
2 Roy. 120. public Statute for the term Mechanics
351
1 Bac. Ab. 86. is a name consisting of subordinate
4 Co. 76 b.
2 Saund 84-88. species. But if the Statute recites the
1 Lev. 86. Case of one Mechanic, for this does not consist of a subdivision in species: Again all Statutes publishing persons to serve as public Officers
1 Sid. 207. are public Statutes, but if concerning
4 Co. 77 Sheriffs only they are private. Every Statute in
8 Co. 28.
Bro. 227. England which concerns the King is a Public Statute of course.

Bac. 643. A Statute giving a preference to the
12 Co. 57 King is a public one, and every Statute
Plowd. 65
8 Mod. 429. concerning the public revenue is a pub-
2 Mod. 248.
613 lic one: A Statute may be partly public and partly private the one
4 Bac. 640 part to be treated as a public the other as a private Law.

Statutes are again divided into such as are Declaratory of the Common Law and such as remedial of it: A Declaratory Statute is one which declares or promulgates what the Common Law is or has been. Pure Declaratory Statutes do not make Law but promulgate those which were already made.

Remedial Statutes always introduce a new rule and this by supplying any deficiency in the Common Law or abridging any superfluity in it: All Remedial Statutes therefore abrogate some rule: The Statute declaring the treason of Lords is an example of the Declaratory Statute.

But Statutes in general are Remedial: Against: All Statutes are either Penal or Remedial (or Penalties), which is the most proper term to be used: Might be used Remedial

is

M.L. 6. 80.

Penal Law

is here used in a different sense from what it was in the last division of Statutes. Being here used as a term distinguishing from the word Penal

A Statute inflicting a penalty or punishment of any kind is penal

The word penalty in its most extensive signification is synonimous with the word punishment: But it is now used in a more limited sense, meaning a mulct, forfeiture or pecuniary punishment - There are certain Statutes which operate as penal Statutes, but are not treated as such: All Statutes which give higher remedies than the rules of natural justice require operate as Penal Statutes but they are not considered as such All Statutes therefore which are not penal are Beneficial or Remedial: Statutes allowing costs in any case are considered as penal Statutes: Costs were not known at Common

4 Co. 41. b. 45. Bac. Ab. 414-15.

Cro. Eliz. 912. 11 Mod. 125 6. 2 Str. 1141. 2 Salk. 597. 1 Ld. Raym. 486. 1 Show. 4. Skin. 4. 1 Salk. 1.

4 Bac. 657. Wilson 25. 3 Bl. Rep. 1 4 T. Rep. 259.

more

Law they were entered into by the Statute of Gloucester in the reign of Edward I. and here City are considered as a franchise & they pay them. But although Statute implies a penalty of any kind and penal Statutes, yet it may not follow that a prosecution to recover the penalty, is a penal action for an action brought by an individual to recover a penalty in his own name & right is a civil action. The Statute is penal but the action is civil. Debt is the proper action to recover a penalty. The form of the action is determined whether it is civil or penal. This distinction is very important for a penal action is not within the Statutes of Jeofails: accordingly the pleadings or record in a criminal action can not be amended nor can the letters be read in an action (qui tam) for a penalty. The tenor

Com. Dig. 100
Salk. 205
1 Burr. 511
4 Burr. 2
Hard 35
Carth. 179
122
6 Edward I.

Dig. Ch.
Com. 388
391
4 Mod. 405
Salk. 258

but such as is under oath will be admitted in a penal action - consequently the affirmation of a Quaker is inadmissible in penal action, Semble in Eng.

Lastly Statutes are divided into Affirmative and Negative Statutes. Affirmative Statutes are those which are couched in affirmative terms, and Negative Statutes are those couched in negative terms. The distinction is important only as it respects the Construction of affirmative and Negative Statutes. It is a rule of the English Law that Statutes go into operation the first day of that Session of Parliament in which they are enacted unless otherwise provided. It being a fiction that the whole of one session is but one day. Since many Statutes may have a retroactive effect it is now usual to mention on the

(13 C. 2. 4 C. 2. 48

3. Fictions

Act 11 G. 2. 19. 2nd Eng. 24. 1. Mar. 31.

Municipal Law

Statute the time when it shall take effect. And from this it follows, that if two affirmative Statutes are made on the same subject and during the same Session of Parliament, neither of them has priority: Yet if they are completely repugnant it is held that neither can take effect. But one of the Marginal Authorities* supports the Law Statute. The rule however presupposes that no time is appointed for the Statute to take effect. This rule of English Law has always been explored in Connecticut: Statutes there do not take effect until a reasonable time has elapsed after their creation. And the rule of Law now is that no Statute shall take effect until the close of that Session of the Legislature in which it was enacted, and not till the Representatives have time to return home. This is a general rule.

* Jones 22. 4 Bac 551. 658

* 6 Mod 25. 3 19 Vin 268 520

* Marginal

Municipal Law

Of the Construction of Statute

Construction; that process whereby the courts ascertain the meaning of the language used which is to govern the decision of the case at bar and that is the law used in the construction of municipal Statutes three points are to be considered: 1. the Preamble 2. the Enacting Clause and 3. the Remedy

The particular rules of Construction have been given: and all the rules are to be observed in the Construction of all Statute Law. But though these rules are to be observed yet penal Statutes are to be construed strictly i.e. according to the letter of them and not according to the spirit: this rule does not exclude common sense: it operates on and not on men: and the meaning of the rule is that penal Statutes are to be construed strictly as against the public and liberally in favor

Municipal Law

The rule then is in favour of the prisoner altogether. No person shall be adjudged guilty under a penal Statute, unless he is within the letter of it. However directly he may be within the spirit of it: so if he is not within the letter he can not be brought within it: and on the other hand, though a party is within the letter of it, he shall not be considered so, unless he is within the reason and spirit of it likewise.

Plowd 17. 1 Bl. 86. 3 Co. 7. 8

Leach, Cr. Cas. 1. 107. 7 T. R. 295.

The rule then amounts to this, a Judge may resort to the reason and spirit of the Law to take a Party out of its penalty but he can not resort to the reason and spirit to bring him within its penalty.

Leach, Cr. Cas. 1. 70. 107. 295. 2 Bl. 310. 387.

If Statute inflicts a penalty on any person who shall do such or such a thing, yet in some case Madmen Infants &c. are not within the Statute: So if a Statute inflicts a penalty on any person who shall be found in the

Municipal Law

the Street a Person who Every man in the State is not within the Statute = In the Construction of Statutes penal Lord Kenyon says the intention of the Legislature should govern

4 T. Rep. 3.

If a Statute for the repetition of an Offence inflict an additional punishment the Offender is not liable to the accumulation or additional punishment unless after he has been tried & convicted of the first Offence +

2 Hale 348. Hawk. 68. Plowd. 465. 4 Bac 65. 1 State Tr. 470. 285. 1 R. at 82 " 83

+ for he cannot plead the second

To subject a Prisoner to the accumulative punishment he must have been convicted the second Offence after he was convicted of the first: Mr Fowler conceives this to be proceeding too far & giving too liberal a Construction

The rule of strict Construction of Penal Statutes against Prisoners is not uniformly observed: Thus by the Stat. 1. Edward 3. Killing the Bailiffs

Criminal Law

murder Petit Treason, through killing of the Husband by the Wife, or the Bishop when there is no Master, are not known to our Law, yet they are intended and are by Construction Petit Treason, and so in our Courts they are. (Post MS. Gale thinks the intention of the Legislature in all cases should be carried into effect in Criminal as well as in Civil Cases.

Penal Laws of our Country cannot be taken notice of in another: So as to have any effect as to the Prisoner: these Laws are local, not transitory. But the rule is that by Locc Shall govern as it respects Civil matters.

The penal Laws of every Country extend through the Jurisdiction of that Country, and are the rule to all persons within the Court whether a foreigner, Stranger (Born or otherwise. In Connecticut they are in the habit of trying, inquiring and punishing any man who shall

6 Co. Rep. 31. 4 Bac. 654 Plowd. 86.

4 Rep. 3.

1 H. Bl. 273 to 278 p. 432. Levy 38 p. 80

Kelly 38. 9 p. 80

should steal a horse in New York and bring it into Connecticut and there be whereabouts: This is clearly contrary to the Municipal Law for a Court in Connecticut can not take notice of the Penal Laws of New York and of course can not find judicially any thing whether it was theft or not: Such a Law not Good or excusive to be manifestly unjust for as the case may be theft may be punished in New York by Imprisonment and in Connecticut with Death:

U. States vs Coggin } If was decided Contra in the United States Circuit Court in the time of Judge Patterson:

When the penalty is continually incurred, the continuance of an offence is in continuing a Nuisance: the penalty only can be sued for and recovered at a time: Decision of the Courts in Connecticut have gone but one penalty while it was frequently in

Peake 57
Def[t] 58

Swift 52
Dig. 52

from the commencement of the second fa-
-mous which is directly opposite to the
English Law.

Confirmed or Remedial Statutes -
These are to be construed liberally or
rather Equitably in the Construction of
which the latter may be either re-
-straining or enlarging in order to ef-
-fectuate the intention of the Legislature.
So as to include cases not within the
letter and take out such as are within
the letter: thus a Law relating to re-
-covery may be extended so as to take
in both Executors and Administrators:
when the reason of the same: Again the
Statute of Henry 8. authorizing all persons
to devise yet by Construction Infants
Lunatics & Feme coverts:-
It is settled that a Statute taking re-
-way a Common Law remedy is to be con-
-strued strictly* thus the Statute of Li-
-mitations taking away a Common
Law

3 Bl. C. 450.
3 Coke 4
Plowd. 305
405
8 Coke 118
1 Ld Ray. 5
Comyns
Rules 390

4 Bacon's Abr. 3

32 Hen. 8.

Dyer 337

*because it
is in derogation of the
Rights of the
Subject

remedy is to be strictly construed. Some connection when taken is necessary with trespass the Common Law it not to be within the Statute of Limitations

The words Law & Boundary Statute and not to be construed so as to extend the meaning beyond the Letter although true words to be used and to the Construction of the Statute of Frauds 3d (the Construction strict) might be construed liberally and some an Injunction. Statutes partly penal and partly Corrective are to be construed strictly in part and liberally in part liberally when it operates in the favour & strictly when it appears against the person. In the Statute a remedy which are generally penal. here when the Statute acts in the favour and reflects a punishment the Construction is strict but when it acts on the favour by protecting against the fraudulent transaction the Construction is liberal

Ld Raym 250. Ld. Ca 650.

Salk 396. Salk 330

+ 2 Blaning the 22 Ben 8

3 Ed 1 c 1 2 Ed 2 c 3 3 Ed 2 c 12 Comm 25 Ed 3 c 5 Ed 3 c 7

Common Law

The different parts of a Statute are to be so construed that if possible the whole may take effect. Repeal by implication is not favored but a new law or provision which is wholly repugnant to the body of the statute is utterly void, and the enacting part is good. So of a Statute saving the Law of A in the body, saving the right of A. If two Statutes are repugnant to each other the latter in point of date repeals the former: So if the latter part of the same Statute is repugnant to the former part or that they cannot be reconciled, the latter repeals the former in proportion to the repugnancy. This is different from the case of Saving (let supra) because this must be framed from a Mistake the other can not be accounted for from inadvertency. When the Common Law and the Statute Law differ the former always yields: the reasons of the Statutes in part be recurr'd to the time of making it

2 Co. 47
Bac Ab.

4 Coke 117
19 Vin. 511
6 Mod 287
1 P. Wms 115

11 Co. to 58
1 Ba. 658

Unrepealed Law.

2 Bac. Abr. 638 (64) it can be ascertained: Even as to the Common Law, which is unwritten: & much the Statute Law is secured of superior authority: Every Statute in its nature is repealable: were it not so there could be no continuance of Sovereign power: The Legislature must be sovereign of three things: To repealing is an act of the Legislature: & every clause in a Statute that it shall never be repealed is void: & is in derogation of the power of subsequent Legislatures:

The Law never favours a repeal of a former Statute by implication, unless this implication arises upon express inconsistency: This said that Affirmative Statutes do not abrogate the Common Law. Mr Fonblanque thinks this incorrect: for frequently such Statute imply a negative of the Common Law (as much as a command implies a prohibition) & the Common Law rule is that notice be given to the Party

2 Inst. 688. 3 C. 6. 70. 1 Bl. Com. 89. 4 Co. 38. 1 Roll. R. 88. Com. Dig. title Ley (B) 2 Bac. Abr. 638 (64) 1 Bl. Com. 89. 2 Bac. Abr. 638 (64)

days before the return day of the process and the Statute twelve days. Where a penal statute inflicts a lower punishment than the common law: it repeals it of course.

Affirmative Statutes sometimes give an accumulative remedy, and then they do not abrogate the common law: E.g. A Statute gives double damages for certain trespass, still the injured party may pursue the common law: If a statute inflicts another punishment than the common law it is called "accumulative": Against this it is said that an affirmative Statute does not repeal an affirmative Statute: this must be considered to be an incorrect and very absurd rule. For one Statute always repeals the other if it is inconsistent with it: If a Statute inflicts a higher or a lower punishment for a given offence than a former one the former is repealed: If a Statute inflicts a higher punish-

2 Burr. 80, 803

2 Salk. 597, 2 Ld. Raym. 1210

4 Bac. 65, 2 Bac. Abr. 125, Bank. 250

Municipal Law.

for a [illegible] offence than [illegible] inflict the Common Law punishment but when it inflicts a lesser punishment than the Common Law the Common Law is [illegible] this rule is founded on the knowledge of the Law.

Whenever a repealing Statute is itself repealed the Statute first repealed is revived & if one Statute should be repealed by three different acts and at three future periods two of them should be repealed the first still stands and still repeals the original one.

A Statute which has been repealed for a period than the repealing Statute to cease of its force.

It is a rule that when a Statute is repealed all acts done under that Statute or during its continuance are valid.

When a Statute is declared null & void by a subsequent Legislature any Law made under it are void.

[illegible]

Retrospective Law

pass appears to him to be contrary to the first principles of Justice and Reason. The Legislature have no power to say that such a Statute was and always should be construed to persons who are to decide on the constitutionality of a Law: by the province of Judges to say whether any act is Lawful or not. if they decide that it is not Lawful or Constitutional then to be bare as to bond under it are void, for such Law will protect no man.

If a Statute is repealed by another Statute which makes provision in the same subject, which provision is limited and confined to a limited time yet still 3 Cas. 205
the former Statute does not revive

As a general rule, no Law can have retroactive operation yet Statutes sometimes have such an operation. it may then be of use, if a Statute having been violated, and before the Judgment, passed against the offender is repealed

Municipal Law

Vaughn 387
Bac. Ab. 45

arise a new Law is made on the same subject the Offender cannot be punished nor can he be punished if there is no new Law made: He can not even the old Law for there is no Law authorising the Judges to pronounce Sentence: and he can not under the new, for this Statute was not in existence at the time that the Offence was committed: He may however as the case may require, be punished at Common Law. This same Doctrine was recognized in the Circuit Court of the United States.

The State vs Broadwell
Circuit Court 4th Conn. 1808

If has already been observed as to petronel tenure, while it is to be found that offences cannot be and not which may at the time of Committing be lawfully done but is afterwards made unlawful by a Statute the Covenant is void and void: So if a person should covenant to do a certain Article which should afterwards be made unlawful to do as the

Salk 198
Ld Ray 1552
1 Bac 317
3 Wm 327
2 Vent 218
Salk 21
Hob 76
Pro C 4 Co 1

Municipal Law

Covenant could be void: And on the other hand if our Covenant not to do an act which is made lawful to do by Statute the Covenant is annulled: Thus a Statute requiring all the Subjects to serve out in defence of their Country, annuls the Contract between an Apprentice and his Master: All Courts concurring, neither of these cases to be inconsistent with the Statute which enacts that the Obligation of Contracts shall not be impaired by a Statute. for by that Statute is meant that no Statute in the terms of it shall impair a Contract

If our covenant not to do and unlawful act, and a Statute afterwards makes it lawful the Covenant is not annulled. In the two former cases, the Covenant is subject to the Statute, but in the latter such a performance is not inconsistent with the Law: If a Contract declared illegal by the Statute is made while

Salk: 198.

Salk: 198

that

Municipal Law

that Statute if in force a Subsequent
Repealing Statute will not make the Con-
tract good nor even allow Contract to be
sued on & enforced. But where the complete
performance is made illegal by a Statute
yet if a partial performance may be
made consistently with subsequent Sta-
tute the party if he request it may recov-
er a partial performance and this par-
tial performance may be enforced by
a Court of Chancery & in some cases
Mr Justice thinks in some cases in a Court
of Law. Such Contract however must
be made before the prohibitory Statute.

The rule is the same where a complete
performance is rendered impossible by an
Act of God: thus if A covenant to convey
to B two Farms and one is burnt by light-
ning before he shall be bound to convey
the remaining one

It is said that a Statute requiring what
is impossible is of no validity: and it is

said

1 Black. 59
2 ... 55

1 Lecture

1 Parker 200
2 Cr. & M
2 Thes 254
2 Bl. 55
3 Bl
2 Com Dig 3
Ca. 81.
3 Bro. Parl
Cases. 889.

4 They call the
first the Law
of Nature &
the second
that of Revel

1 Coxe 284
1 Bos & P. 48

Ld Ch J

Abercrombie & Ewa

over by Foral Coke that Statute cannot
stand & the Law of God and reason are
clear: This principle is admitted in our
Court of Justice Blackstone Commentaries
and denied in another: Mr Locke
owning it to be a position which can
not be questioned: he says it is clear that
the people are bound to follow and un-
derstand Laws which may be contrary to
the Laws of God: But the question whe-
ther Legislative act contrary to the
Constitution are void? is a very diffe-
rent one: It is clearly settled in the
United States that they are void: Courts
of Justice are at liberty to declare them
so: The object of the Constitution is to
restrain Legislative Usurpation

It is said when a Statute enables a
Court to do a matter of Justice to a par-
ty the Court is bound to do it, in case
it falling within the Statute and the par-
ty may on a plain claim at any usual
time of right

8 Co. 118.
Hob. 87 a 87
1 Fonb. 23.
Ld. 6. 41. 91

2 Peere Wms
293 278
1 Peckey
notes on
Blk: J.

3 T Rep 558
2 Ves Jr 354
3 Ves 354
2 Stor. 1131
U. Pas 644

Municipal Law.

1 Hawk 8 c. 114 s. 2 Inst 118 Foster 384 Comyns 374 2 Burn 342 1 Mod 452

If a Statute make a new Law concerning an old Offence and commits to a new Court to execute that Law, there the Jurisdiction of the ordinary Court of Criminal Jurisdiction is not ousted: If a Statute enacts that all Crimes of a certain particular description shall be tried by certain particular Judges, the rule is the same: because the Jurisdiction of a Court is not to be ousted but in publication

If the Jurisdiction of the ordinary Court of Criminal Jurisdiction is ousted in any case it must be done by implication, and it is clearly established that the Jurisdiction of Courts of general Jurisdiction is never ousted by implication.

But if a Statute create a new Offence and also creates a new Jurisdiction for the trial of it the Court of ordinary Criminal Jurisdiction is excluded

1 Hawk c. 2 Hale 5 Statute 93 Comyns 374 Foster 343 Hawk 3rd ed. note

The Authorities are not agreed on this Subject but it appears to me

that the Court of Kings Bench would be welcome of a special authority is given by a Statute to certain persons of a return the property of individuals, that authority must be strictly pursued & it must appear upon the face of the proceedings to have been strictly pursued otherwise it is not valid — Comp. 90.

Where a Statute enables a certain number of men to transact business by a vote of a majority and constitutes a certain number of them a quorum & Geo. 643. 10 Co. 30 Bro. Ab. 211 3 T Rep. 592 4 Dr. 80 9 Ves. 234 10 Mod. 18. it is a question whether a majority of that quorum can bind the whole body. The better opinion is that a majority of that quorum is not binding — The Officers have no power but such as is expressly given them or such as is necessarily incident to them — It seems that a private authority created by Statute and conferred upon two or more persons is joint and not several, unless it is a Rot. Parl. 2 Ric. 2. Pl. 2 No. 2 Bridge

Bridge

expressed. and this power ceases on the
Bac. Ab. 181. b. Dissolution of one of them. But it is said if
10 Mod. 419. a. 336. a power of a public nature is given to
3 Bac. Ab. 417. 3. several the act of a majority will bind
1020. 3.
3 T. R. 426. 2. the whole all being present: But the
above rule does not affect Mr. Attorney
2 Salk. 191. 2. 192. 3. for when a Corporation is created a ma-
3 Burr. and Cas. 1363. 2367. jority of those present can act for the
whole. the individuals who compose it
are not regarded

There is a very material rule laid
1 Bos. & Pul. 45. a. down as to the Construction of the words
3 Term Rep. 66.
& 80. 209. "Void": A void and voidable act are
2 Ld. Raym. 871.
2 T. Rep. 600. very different. A void act is a mere nul-
7 Durn. 310.
2 Mun. Rep. 45. lity ab initio. A voidable act stands
473.
good until the act is set aside by the
course of Law: A void act can never be
ratified a voidable one can. A void
act can be taken advantage of by any
person but a voidable act can be taken
advantage of only by the parties or their
privies & by Collateral Estoppel. The rule

Municipal Law.

as to the construction of these words, if the object of the Legislature can be obtained by construing the word void to be the same as voidable than the word is construed as if it were voidable. But if the object of the Legislature, cannot be effected by construing the word void to be the same as voidable then the word void will have its strict construction = The distinction is not founded in the Books, the authorities cited are merely declaratory = The rules as to the Construction of Statutes, are the same in Courts of Equity as in Courts of Law but the mode of enforcing the Law is in many cases different: and it is here to be observed that the rule of Construction is the same in Contracts, as it is in Penal Bonds and Mortgages

3 Bl. 430 & 438
1 Term R. 32
Burr. 264

Municipal Law

6 Lecture
8 May 1812

Of Pleading Statutes and the mode of Prosecuting upon them. There is an essential difference between pleading, counting upon and reciting Statutes. To plead a Statute nothing more is necessary than to shew that the facts come within the Statute. E.g. Statute of Limitation: nothing more is necessary than to plead the limitation section in the words of the Statute.

3 Co. Rep. 1. 62.

Counting upon a Statute is a different thing from pleading a Statute. Counting upon a Statute consists merely in an express reference to it, praying the benefit of the Statute in such case made and provided" or by virtue of the Statute in such case made and provided"

Reciting a Statute is to quote its contents. To plead a Statute, to recite it, to count upon it and to avail themselves of it are different things but often confounded.

It is a general rule that foreigners are bound to take notice of Public Statutes: But Judges and Lawyers (Judicially) of Private Statutes unless they are set forth: for take the same concerning private Statutes as Deeds or other private Contracts

In Connecticut under our rule of pleading the Defendant may give in evidence any of Defence under the General issue any Private Statutes. But still he must read the Statute as he would a private Deed must? Yet here as well as in England the Plaintiff if in Error to Relinquish it. it must be set out as Deeds of

A Public Statute when required to be pleaded or counted upon need not be recited = It is said that it is not necessary to recite a Public Statute yet a Recital will be fatal, provided the Recital is in a material part and after Verdict, although the Statute need

4 Co. 76
2 Salk. 679
Bac. Ab. 86.
Co. Lit. 234
Mod. 87
1 Burr. 38
383.

Stat. Ch. 1
342. 3

4 Co. 76
10 Co. 57
1 Chan. 58

1 Wms. 508
Co. Lit. 234
2 Salk. 679
6 Mod. 307
(35. 302. 304.)
Comb. 447. 474
Doug. 790.

Municipal Law

not have been pleaded = That, the recital of a Public Statute is not fatal

Plowd 85 4. Mod 203 Bridg 3 Freem 2 2d Ray. 382 2 Mod 241

on a General Issue, the Court will only the Counsel to the Jury what is to be [illegible] the Statute and then concluding by saying "against the form of the Statute aforesaid": The Court trusts the last rule of the construction, when the mistake is upon the material part, but not otherwise. The last rule is the correct one. = After Verdict a wrong recital of a Private Statute is not cured [illegible], as the pleadings appeared to the Court = If the Statute is [illegible] recited advantage may be taken of it by pleading that the Record or it may be taken advantage of by plea [illegible] as it fit = Here the Recital and Demurr* in this respect a Private Statute is tried like a Deed

4 Mod 68 2d Ray 382 2 Mod 241 8 Mod 336 2 Inst 687 3 Bac Abr 641

* or the may [illegible] pleaded in a plea with the Issue

In a general rule that a Public Statute cannot be pleaded but the

5 Coke 59 a. 119 a. 5th Rep. 119.

not universally true. ✱ Public Statute in England whereby a fine to the King or a Penalty must be claimed. ✱ by availing themselves of the 21st Jac. I. of Usury

Bull. N.P. 172. 3 Salk. 311. 4 Mod. 394.

Cart. 80. and the Defendant would defeat the Specialty ✱ he must plead Statute but not recite the Statute. Yet to defeat a Simple Contract he need not plead it. One who would found his action on a Public Statute must plead it for the Plaintiff must state the particular ground of his Claim: but he need not recite the Public Statute. One who declares upon or otherwise sounds on Statute when it is necessary & fit to recite it, need not recite it Generalities: for a recital of the substance is sufficient. If a Statute is part Public and part Private it must be recited as to the private part but as to the Public part the Judge are bound to take notice of it Ex officio: (But it is not necessary to recite the title or preamble of any

2 Roll. Abr. 466. 4 Co. 76. 2 Mod. 5th Bull. N.P. 224.

10 Coke 57. Bull. N.P. 224.

3 Coke 33. 4 Rep. 655 658 any Statute for neither constitute any part of the Law. Mr Gould says the knowd of general instances where a Recital of the Statute &c. prevailed (i.e) of the title or preamble

But it was now held that a recital of the title of a Public Statute is not (even though modern acts say it is) Yet this Mr Gould conceives ought to be taken only not to the rules already found = When it is necessary to recite a Statute the party must give the date and the place at which it was made

When a private Statute is pleaded the other may plead "Nul tiel record" 8 Co 28. 4 Co 76. Cro Ch 358 2 Mod 57 for the question whether there is such a Statute or a question of fact and to be tried by a Jury. But "Nul tiel record" can never be pleaded to a Public Statute, for this is not a matter of fact and it can not be tried by a Jury. yet the Court are to determine whether there

4

is such a Statute or not - the declaring upon Public Statute the Plaintiff must plead them, but it is not necessary to account upon them: To plead a Statute is nothing more than to state the party which comes within it & this rule there are three exceptions 1. If the party has a remedy at Common Law, and upon the Statute, he who would ground his action on the Statute must account upon it otherwise it will not be known, that he intends to ground his action on the Statute - There are many cases of this kind. Lord Coke in his title of Pleadings lays down the contrary rule

2. So in Actions brought on Penal Statute, though they are Public still the Plaintiff must account upon them: the reason of this rule is unknown to Mr. Serle, though still he says one may go on

19 Vin. 503
1 Bac. Ab. 38
Co. Lit. 681
Carth. 182

2 Hawk. 57
1 Com. Dig. 230
Lut. 564
4 Bac. Ab. 18
Contra

2 Hawk. 306
7 Mod. 152
2 Bac. Ab. 333
Plowd. 206
Lut. 32
1 Cont. 113
1 Bac. 35

Municipal Law

2 Bac 652 — 3. If a public Statute gives a new
2 Bos 374 — form of action unknown to the Com-
2 East 334 — mon Law it is necessary to count upon it
Salk 598 — if the plaintiff would found his claim
2 Ld Ray 339 — upon it. Viz the case when a new
341. — species of action is given. But where a

1 Com Dig 331 — Statute creates and the remedy or action
2 Bac Abr 303 — is in use case it is not necessary to count
2 Bac 345 — upon it. In ancient and Public Statutes
Dyer 85 — which are remedial or beneficial the ge-
87 — neral rule is that it is not necessary to
4 Bac 655. — count upon them. Although where the Sta-
tute does not expressly give and remedy at
Smith 582 — all it is not necessary to count upon it
Salk 221 — If one Statute prohibits an act, and ano-
ther inflicts a penalty for the violation of
2 Bac Abr 305 — it, it is necessary to count upon both
Cowp 206. — When there is an offence against the
2 East 333 — Common Law and also against the Sta-
2 Bac 650 — tute, you may in the indictment lay the
offence as at Common Law and also upon
the Statute: but it must be done in two

Counts.

Municipal Law.

There are many
y are offence at Common Law which are
so made an offence by Statute.
If a temporary Statute be expired and
is continued by a subsequent and distinct
Act on the former and is sufficient
If the words "against the form of the
Statute" are inserted in an indict-
ment for an offence at Common Law
and not by Statute, such words though
surplusage will not vitiate the plead: they
are considered as mere surplusage
If a Contract good at Common Law
by parol is by Statute required to be in
writing, still it is not necessary to declare
that it is in writing: the declaration may
aver that the Contract is in writing.
Such a Statute introduces a new rule
of evidence and not a new rule of pleading
But if such a Contract is pleaded in
fact to an action, it is said to be necessary
to aver that it is in writing. Qy if
not being

Lev. K. 285 a.
2 Sid. 258

2 Mac. 638
656
Stat. 29 1866

5 Mod. 167 a.
Id. 362
Id. 363
2 Wms. 625.
Sp. 115. 116

7 Geo. II. c. 20 May 1812.

2 Mod. 270
Bul N. P. 279
3 Bur 1890
1 Bos. & P. 480 a.
" 480
Com. 28
Peb. in Scales 229
209. 201
1 Wms. 217-8
2 Ld. 1146

Municipal Law.

writing is necessary to the validity of a Contract at Common Law, it is necessary in the pleading to aver the Contract to be in writing = Thus a Contract of a Spiritual Court which at Common Law must be in writing, and in the pleading it must be averred to be in writing as the Plea is bad = But when a Statute makes writing necessary to the validity of Contract which Contract is unknown to the Common Law, such a Contract must be averred to be in writing, as the case of a Sale of Land = In pleading Statutes the exception in the enacting clause must be negatived by the prosecution and averred to do it vitiate the Pleading: But an exception in a distinct clause need not be negatived by him who takes the benefit, the Defendant may plead his Plea as if no Proviso = Exception in the enacting clause go to the description of the thing or right enacted but exception in

2 Mod 310
Esp. 263
6 Co. 58 a
Earth. 275
Smith 275

Doug. 202
Hard 512
5 Bac. 556
Salk 280

Esp. 161
6 Mod 155
3 Wils. 83
6 Dy 35 b
" Dy 24
" Dy 342
Cart. 146
Bac Abr 556
Salk 280
1 Camp 331
Com Dig. Title Ac-
tion on Stat
A. 2

in-

Municipal Law

in the district and [illegible] should do
not as to the description of the claim or
right.* (When there are two prescribing
remedies in the same case, one by Com.
Law and one by Statute either of them
may be pursued = In case of this kind
of the plaintiff pursuing the Statute pow-
ers and through want of evidence or the
like can not recover or support his ac-
tion, he may in the same suit recover
upon the Common Law rule or re-
cover this may be done either in a Crimi-
nal or Civil action, even though he should
not upon the Statute =

(* that which is void at Com. Law
is made illegal by a Statute and a par-
ticular mode of prosecuting it is pointed
out by the Statute that mode must be
pursued and no other will answer

(But this rule holds only in two classes of
cases, viz 1. When the particular mode is
prescribed in the prohibitory Enacting
clause

* but by [illegible]
[illegible] for the
[illegible]

2 Bank 382
Leach 285
2 Bin 399
Salk 285
Salk 245.
Comb 64?

2 H.B. 90
Bank 2
2 D. 382. 350.
Salk 219
5 T. Rep 14 [illegible] 149
5 Coke 99 +
Co. Lit 285 +
347. 604 +
2 Salk 449 +
" 791
2 Ch. Pl. 1.
D. 108
Contra
vide authorities marked +

6 Geo. 4 c.
Salk 45 c. 46
Geo. 36. c.
2 Wm 815
803 830
4 Bin 2323

a law so that the mode is incorporated with it. Where there is no prohibitory clause but the Statute says whoever or they or they shall be punished &c. &c. there is no offence created by the terms of the Statute. But where this mode of prosecution is prescribed in a separate substantive clause the rule does not hold and this is generally the case. Yet if that which is prohibited by the Statute was also prohibited by the Common Law, and the Statute prescribes a new mode of prosecuting, still the mode of prosecuting at Com. Law is not precluded the Statute is only an accumulative remedy. If a Statute creates a new right or an offence and gives no remedy the Common Law will furnish one.

1 Bac. 54
2 Hawk. 302 note
3 Rich. 200.

2 Bac. 805
Hawk 302
3 Rich 200

1 Bac. 54
6 Mod. 96
12 Vin. 512
3 Lev. 290
Dav. 44
1 Ca. 54
Bac. 553
Co. Ent. 655

It obstruct the execution of any power or grant by a Statute or Statute is an offence at Com. Law and the individual need not and ought not to

conclude

Conclusion Caution for mind Statute

Who may Prosecute in Penal Statutes?

It is a general principle of the Com-
mon Law that an Offence is not to be
prosecuted by any individual in his
own private capacity for the Public is
the party injured and the remedy belongs
to the Public. The Statute Law may
make an individual to prosecute for
an Offence done to the public, but this is
on the ground. This practice has never been
allowed in Connecticut. In England
however private individuals can and do
frequently prosecute Offenders and in
civil suits but they is in the name of the King
by information on the part of the Pros-
ecutor which is generally done to recover a
Penalty or Forfeiture.

There is a Society of mixed Prosecution
partly, private and partly Public here to
wit.

Folio 22
2 Caines 265
4 Bac. Ab.

Leach Cr.
Cases 240
235, 238,
229, 238,
251, 250
2 T.R. 4
100 108 205
3 Bur. 1438.

2 Bac Ab 604
Bac 57
3 Bl 6 162.
Dr 3.18.

* 62 qui tam informations when by virtue of what law & information-

partly in the name of the King and partly in the name of the Subject which is called a qui tam prosecution: it is an action or prosecution sui generis. A qui tam action and a qui tam prosecution differ in this viz: the first is a Civil suit and the rules of Civil Suits must be observed and pursued: the party may appear by Attorney: but the latter is conducted by criminal principles if counsel the prosecutor cannot appear by Attorney but must come in propria persona = A qui tam action is carried on like a Civil case and a qui tam prosecution like a criminal case: such Action however depends upon the form of the process. Any qui tam action brought by an individual to recover a penalty is a Civil Suit = Qui tam Action and must universally founded on Penal Statute = they are now continued as one Species of the Penal Statute

3 Bl 6
4 Dr 3.58.
Bosch 382
4 Rich 750
758
3 Dr 448
4 " 257.
3 Mich 148.
Rich 149

3 Bl 6
Dr 3.58

1 Dr 3.
Ca Lam 360
6 Co 3.
Co Bl 5.
1 Bl 3.
2 Black 3.
Dr 3.
Bl 5.

And in the case of a qui tam action the Statute of Profits justifies and a mandamus of the Rioters =

There is also another species of action known and denominated as Penal Statutes, called a "Popular Action" which is frequently tho' improperly confounded with a Qui tam action" = A "Popular action" is one that is given to any individual who thinks proper to prosecute and recover a penalty incurred by the violation of a penal Statute and whether the prosecutor receive the whole or only a part of the penalty the Action is still "Popular" = A right to prosecute qui tam is frequently given to the party injured only: & then when penalty is given to the party who will sue for the injury it is "Popular" but not qui tam = Whenever a Statute prohibits & commands a thing for the benefit of any individual he may have a remedy by an action founded on the Statute for an injury occasioned by its violation

8 Lecture

3 Bl. 160 2 Dr. 437

1 Burr. 337 Contra

Com. Dig. Action B. 6. Com. 284

If an individual is injured by any offence prohibited by a Statute he may have his civil action on the Statute.

When a Statute inflicts a penalty for infringing any one of his rights and does not appropriate the penalty it is supposed to the party injured and not to the public.

Ch. What are Qui tam actions.

Are to be brought.

If for an offence immediately injurious to the public a Statute gives a penalty or part of it to any who will prosecute for it, any person may prosecute qui tam &c. As where the Statute prohibits the solemnization of marriages now this can no injure to the individual yet for violation of that Statute any person may prosecute the offender qui tam wise.

When the offence is immediately injurious to the public only no individual can prosecute qui tam wise unless the penalty or part of it is given to the prosecutor &c.

since certain

If a Statute prohibits an Offence under a particular penalty to an individual, he may have a qui tam action, though the Statute do not expressly give the party the penalties or any part of it: or though it does not provide that he shall recover his own damages: This rule is not well settled though, Mr Swift thinks it is good Law = When a penal Statute expressly gives the whole penalty to the party he must sue and prosecute in the King's but may sue a qui tam = In conformity to this rule qui tam actions are given in Connecticut in case of theft forgery and many other cases = When a fine is given to the King and a civil remedy to the party injured, the fine may be inflicted & sued for and the damages of the Party in the civil suit. This is as by Common Law = A Plea not guilty cannot be the usual issue in Qui tam actions, but to the mode of recovering penalties given by Statute =

When no bond of action is prescribed for the recovery of Statute penalties the action

d

2 Strange 1267
1 Bac Ab 379.
4 Co. 57
2 Bac Ab 5th Ed. Dis. title "Action on Stat. II. 1"

2 Burn's Ecc. Law 228 229 title "Actions upon Stat. II"

Smith. 522
2 Bac. Ab. 588.
4 Bac Ab 411-11
Salk. 373
5 Bac Ab 95

of Debt & this would seem but it seems that Brumpit will be held to be the Law this has been held a good action and these cases of prescriptive limitation things say is the action of Debt seem to be a strange action to be brought on this occasion but it is founded on fiction = if the Indictment is drawn & they are to be fined so much how he is confined as having promised to pay this when he violates the Law there is a kind of privity of Contract raised between the Prosecutor and the Confectioner =

When part of a penalty is given to the King and part to the Prosecutor the King of Prosecutor may receive the whole penalty: it is the same in the United States, penalty

contrary = a bona fide conviction or acquittal on a qui tam prosecution is a bar to another prosecution for the same thing for no man shall be tried twice for the same offence = There may be a qui tam prosecution as conducted by the Crown

of

the offender and here if the action qui tam this will be no bar to the second prosecution = The pendency of a Qui tam" prosecution may be pleaded in a Statement on a subsequent indictment for the same offence = in some books it is said it may be pleaded in bar, but this is incorrect = A person claiming a penalty under a popular Statute has no right to the penalty till he has commenced the action or prosecution = By commencing the prosecution he acquires an inchoate right and this right is consummated by the judgment = But here the Crown may release the whole penalty, if no action be brought = In case of a Remedial Statute (if otherwise) for here the party to whom the injury is done has an inchoate right to compensation & damages for the injury = After a qui tam action is commenced the Crown cannot take away the right of the prosecutor to the penalty for

5 Mod. 4
2 Ld. Raym. 1246
1 Salk. 56
3 Bur. 1425
2 Black. 1290
3 Co. Inst. 214

9 Mod. 59
11 Coke. 65
2 Hawk. 351
2 Bl. R. 1187
4 Bur. 2527
2 Bl. R. 1187
3 Bur. 1403
2 Str. 1267 ; 211.
2 Lev. 141.

Doct. & Stud. 3.

3 Mod. 97
2 Bl. R. 1187
2 Co. Inst. 381
11 Co. 65

St. 2 & 3 Ed. 6. c. 24 s. 5

prevent the prosecutor proceeding to recover it: tho' the Statute may release his own private right to the penalty, they said however that Parliament could release even after the commencement of a suit. Mr. Paley thinks this can not be done even by Parliament unless it is done by a release under the Seal of the Court. When a Statute gives part of a penalty to the party aggrieved the King can not discharge the party's right even before the suit is brought.

2 Bl. R. 837

1 Term 58. 2 Bl. R. 811 Cowp. 710 2 Black. 1076 392

1 Gilbert.

Before the Statute was made to the contrary the prosecutor could release his part of the penalty after the conviction in a popular action. But the accepting Qui tam for the Conviction to prevent a second prosecution. It is provided by the Statute 4 & 5 W. & M. that no conviction

St. 4 & 5 W. & M. c. 24 s. 20

upon any information in a popular action shall be a bar to any other prosecution for the same offence, and that no release of the pending the action or after conviction shall

a

Exceptions to Law —

It is objected that the Statute 4 Geo. 1st. Cap. 11 does not take away the Common Law Principle that a Penal Law is gone by Prosecution & Suit by Information or Indictment. Therefore that the Statute 4 Geo. 1st. Cap. 11 is in affirmance of the Common Law for the first Proceeding is void

But this does not follow by the Plaintiff's conviction or Judgment would not by Common Law bar the King from Prosecuting for the Use of the Penalty — Now in the Statute 18 Elizabeth the Prosecutor is not compelled the Prosecution at all but the Defendant may appear and plead, and then without Leave of the Court under pain of the Attorney of the Plaintiff in a Popular Action may withdraw his Plaint or suffer a Nonsuit the King may still proceed in the same Suit or in like a new Prosecution — If several Persons are convicted together in a Popular Action for violating a Statute only one is

[illegible]

Ag. to Comm. Law in Com. Dig. 395 3 Bac. Abr. 27 Vin. Abr. Penal Laws

5 Co. 85 b. 16 a. 2 Raym. 791.

1 Sid. 13 1 Lev. 13 5 Eliz. c. 14 § 4 2 Bulst. 307 1 Burr. 348 1 Salk. 18 5 Geo. 2 c. 28

5 Mod. 18 b. 2 Burr. 1128 1 Bl. Rep. 384 3 Salk. 52

& presumed. But if they are prohibited by the Municipal Laws publicly enacted and pain the offender shall be punished. In the former case the penalty is confiscation of goods and fine & imprisonment but in the latter case the penalty is inflicted for the crime or offence as the punishment: as each one is guilty of the crime each one shall be punished. We could think there is no solid foundation for this distinction.

One offence may consist in a number of facts & one fact may constitute a number of offences. Where several acts constitute but one transaction & offence, there can be but one penalty. In particular relations where the Plaintiff is entitled to recover under they are expressly given by statute. But where the party injured proves only he is entitled to costs as in other cases of action.

Feb. Term 1812

1st & 2d Lecture

15 May 1812

Arrest of Judgment

First will be considered the right which the Husband acquires to the personal property of the Wife.

1. Concerning that in possession. and
2. For which an action

I The personal property of the Wife in possession is her money, furniture &c. The Husband at the time of marriage acquires an absolute title to all her personal property in possession in the same manner as if he had purchased it with his own money. The property is transferred the moment the ceremony is ended and can never belong to the Wife again, unless it be given her by will on the death of her Husband. This personal property of the Wife in possession on the day of the death of the Husband vests in his Executor and not in the Wife; and this is one of the peculiarities of Law. for there is something peculiar at

Co. Litt. 351
Dr. & Stud. Dial. 1. Chap.

Baron and Feme

a Wordin the transfer for Judge Scandrup
be known of the other transfer which is good
that Lenny to defraud Creditors. This transfer
in certain cases may operate injuriously
against them and they can recover back
the Est. - It may be asked how this can happen
when the Husband is liable to pay the
Debts of his wife? Answer to remember that
that the Husbands liability to pay his wifes
Debts exists no longer than during Coverture
consequently if the wife dies before the
Husband pays the Debt the Creditor can recover
it from the Husband - So if the Husband
die before he has paid the Debt the Creditor
must now recover it from his Executors
But in the last case supposed the wife has
the property which she retains in the
Husband the Creditor can recover it out of
Specific Est. Debt

B.P.C. 4 Ed. 412
Talb Ca. 173.
1 Vern 158.

The Husbands liability to pay his wifes
Debt, does not depend on his receiving pro
perty from her for he is liable even tho he

1 Bl. 5. 442
3 Mod. 186

receive

Arrow and Penn

receive any or not - The Husband is never considered as a Debtor to pay the Wife's Debt, for if he may he would be liable to pay them after her death or after his death her Executor would be liable - The Wife is considered as the Debtor and is for this reason that the Debt survives against her on her Husbands death - It may be after that of the Husband to be sued at all - How the Husband must be sued with the Wife in case of the Wife's debt contracted before Marriage:

As the ground why they must be joined in the suit Judge Reeve conceives to be this. The Wife being Debtor, must be sued and by marriage she is deprived of her property therefore if a suit was commenced against her alone, the judgment must go against her alone and she must be imprisoned and as during the coverture the Husband is liable to pay the Debt - How you could not [illegible] and without the other, for the Debt of the Wife and Husband are at at [illegible]

the

Learned and Found

the other must be alive
2. If to the Husband right to the things
in action
These things in action are not, strictly speaking, reduced into possession by the Husband unless he has recovered them, but they belong to him in right of his wife, as to the personal property in possession: but it is as to the disposal of them, or to any advantage to be derived from them, that they are not vested in him by the marriage, but only a right to them, so that he must sue at law in his own name, as well as in the name of his wife: and when recovered they are absolutely his and go to his Executor. There was a question formerly, where the Husband had imbezzled a debt due to the wife, and before the money actually came into his hands he died. But the Court said it was reduced into possession for the Husband against himself and that was sufficient. If the wife in such case she must go to the Husband's

Dixon and Dixon

Q made a devisee only and not owner of the property - the Husband may dispose these chose in action and the assignment of policies and the assignee has a good title to them - His assignment must however be on a valuable consideration seemy to his own choses - there he may give away without consideration - If the Husband does not dispose of her choses in action during coverture he can never do it at all - he can never bring them in by will - therefore if he dies before he disposes of them they go to his wife or if she is dead to her representatives by the Common Law - There is a statute in England which will be no bar directly - There is sometimes a ruling Equity in this subject - In Equity they consider the Husband as a purchaser of the choses in action when the Husband has made a competent settlement on the wife before Marriage - Now this settlement has nothing to do with a jointure

V. 1 B. Ch. 44
2 Atk. 207
417

for

Parker and Ferne

on that of the Crown of her Dower
of that when a contract or settlement is
made before marriage the Husband is entitled
to the Profits absolutely & real and personal
from payment of the Day money to trustees for
her use and they do not perform their duty, how is
the Husband to act if it? The legal title is not
in him now in his wife but it is in the trustees
how he must go to them and on it and even
they will refuse him unless by his will make
a decent provision for his wife either out of
that or in some other way. (But they have
to be found with this rule when the wife has
come into Court and waived the provision of
his Will; yet in this case it must appear
that she acted freely. But perhaps the Court
had an eye for the Interest only and not for the
principal or here the Court exercise a different
power from Court this will, and allow him to
take it if he had a large portion for his wife
how will they get from him it unless his will
under a simple provision for her without her

2 P.W. 630
3 Ves. 10
2 Ves. 17
Str. 699
3 P.W. 202
2 Atk. 179.

2 Vern 516
1 P.W. 502
Pal Ca 98.
188.

a settlement if there is no express agreement
that the wife will not have a provision
tence - The object of a Court of Equity
husband Marriage in the view of the contract
wife and must therefore make provi-
sion for the life of the wife to prevent the
ruin of the Husband had effected their
object for a valuable consideration it presumes
that Equity will not compel the performance
to make the provision for the wife -
I have been sorry Judge Rivers expressing
a doubt on this subject observing of those Cases
where the legal title is in some other
person, even in the Husband
I have also sometimes the judge been oppos-
ing of an unwilling trustee but where
the trustee is willing the Court of Chancery
will not interfere to prevent it even if the
Husband has a legal title it may obtain
there object without making any transfer
it has been already stated that if the wife die
before the Husband her object would be a lien

Even in

3. 9th

2 c. 5th 20
p 17 - 38 c

18
Dec 4. 61.
Ono Chy Cases
Brown
v
Martin

3 c. 4th 129
2 D. 2 D. 1 c.
R Chy 64
2 P. 17 - 65
3 D. "

2 Lecture
To May
1847

Parmenia Tims

Executor to pay her Debts. Must be altered that the Husband is the rightful Executor of the Wife, and must collect her choses in the Common Law. The surplus remaining after the Husband has paid all her Debts will go to her Representatives

4 Co 28 (Poles Case) 10 Co 68 (Prince's Case) 8 Mod 388 Salk 302

But it is Required by Statute 29 Charles the Husband is not obliged to account for the surplus as he could at Common Law. It follows then that in those States where no such Statute exists the Common Law rule governs, and they the Husband being Administrator must distribute the surplus to the Wifes relations(ex) Representatives. There is no such Statute in Connecticut in New York there is one

Swinb 15 (Bac 15 Mod 165)

as to the Personalties chose the Husband has the same right to them, as he has to the Wifes Real ones

2 Fearne 4 Co 51 (Keene's Case 8 Co 2 Dr 26 Eq 4 Dr 71 Ab)

For a Historical account of those persons able and capable of administering see the Statutes at Large and Marginal Authority

Swinb Book 357 3 Swinb 357 Mason 266 87

4th Brown Moore Term

Now could it be considered the Husbands right to judgments obtained in his own name and on the name of his wife when it was for her choses in action

Where a judgment is obtained in his own name and in the name of his wife for a Debt due to the wife and the Husband dies before it collected and before the wife the judgment belongs to the wife and if the wife die before it collected it belongs to the Husband how it may be asked upon what principles does this go to the Husband as survivorship not as Administrator for it not collected therefore is an exception to the rule as in unpaid orders which are not reduced to possession the reason of this is that the judgment is a grant one and in the character of joint tenancy it passes to the Husband by the benefit of survivorship that gives it to the Husband consequently we clear that between the principle of survivorship does not exist the Husband can not take the judgment also

2 Dev. & Bat 387

to be

Parol and Feme

as a Husband but only as an Administrator of the wife and that it will be optional in his hands to pay her Debts. How in many of the States the Doctrine of Survivorship is entirely exploded: it is in Connecticut & in Rhode Island where it does not exist it cannot be created in the same manner as it is treated in case of joint Merchants consequently the Husband has a right to collect the Judgment now that is due. & then he must account for it and as aforesaid it will be subject in his hands to pay the Wifes Debts. It may also be urged from said decree that the Husband might release the Wife of her action during Coverture. But if the Wife has an Action for Life the Husband can release only during the term of his own life or during Coverture. How the ground of Divorce being that an Action is dead & extinct and not survived to an incorporeal Hereditament. Right will be confirmed

to

Baron and Feme

The right which the Husband has to the chattels real of his Wife — 3 Inst. 214. Co. Litt. 300 46. 307 1 Roll. Abr. 340.

such chattels real generally for debts or portions to be raised out of them in this Country. He has the same power to dispose of them that he has to dispose of his chattels in action: and they are also liable to be taken in execution for the debts of the Husband if he otherwise in case of an elegit, statute merchant or statute staple cannot be levied on Lands. When these leases are taken in execution the title is transferred from the life of the Debtor. But as to the reversion after the death of the wife neither do they extend to it. Co. Litt. 300 46. 351 Roll. Abr. 340 3 pl. 343

How the Husband has the interest of them and the profits arising from the inheritance of them as to rents and if the Husband dies without disposing of them they in that case will go back to the wife as chattels: and if the wife dies they go to the Husband not as to the inheritance but absolutely as chattels

of

Parol and Terme

Cases cited by Pl. Com. 358 Plowd 278 Cro Eliz 580 Sid 448

of the Lease for Lives on the Death of the Wife go to the Husband as Administrator But he holds these Chattels Real as his own & the Lease for years upon mortgage the Equity of Redemption belongs to the Husband on the Death of his Wife: Now it may be asked how the Husband should be entitled to the Lease for years upon the Death of his Wife: no other Reason can be given only this he acquires it - It seems to be a mixed Rule of Law But it is contended by some that it is upon the principle of Joint Tenancy: the same as in the case of a Lease for Joint but this is not true for in order to constitute a Joint Tenancy the Title must commence at one and the same time & this must also be by the same right and it must also be created by act of the parties Now this is not the case in Leases: consequently from this we may infer that the Lease on the Husband holding the Lease on years after the Death of his Wife is

Cro

Dower and Tenure

in this country the same as in England for it does not depend on the ground of joint Tenancy. The Husband can not devise away by will these Estates for years of chattels real of the wife. Though I judge I can suppose that a lease of them to commence after his death would be good. The Husband may lease his wifes Estates and if he should die the rents & profits go to the Executor. The wife would have the reversion: and if this should stand why does she not also have the rents, as by a rule that the rents should follow the reversion? It is answered that rents go with the reversion in case of a free but not in case of a chattel real consequently she can not have the rent though she has the reversion. There is one case in which the Husband can not have it by where a feme sole owned a chattel real and married before the marriage: not in the case of the wife for before the Statute

Co Lit 287. Sayth 5 Mowre 340. Co Litt. 35. 2 Eden 344. 1 Vern. 4 18. 2 Ch Ca 418. 1 Eden 345. 2 Vern 94. 2 Ch Ca 88. Freem Re 88. 2 Ld 18. 4 Cases 354

over.

courts the delivery or before he recovered to do so, he can not hold it: on the ground that the person must be seised in order to have his property defend: but it will go to her representatives.

Co. Lit. 351. 2 Show. 282. 2 Ld. Raym. 1085. 2 Atk. 393. 2 P. Wms. 291. 3 Bl. Com. 29.

The wife may have been possessed of what the Law calls an Estate before marriage in this case the Husband gets nothing but the marriage

1st Lecture

Next will be considered what estate the Husband acquires in the Real property of his wife at the time of marriage i.e. in her lands or any estate of a Real nature. By the marriage alone the Husband acquires the use of all freehold Co. Litt. 351. estate either in fee simple fee tail or for life, during the Coverture. The use of these estates Husband for life and in addition to marriage is in the case with respect of the wife he at an end as to the Husband for in this case he gets the Rents at Law of the life from the wife

During

Baron and Feme

Reversion the reversioner has no other interest in the Estate until it is a fee simple the fee remains in him: any property if there is an injury done to the inheritance as by committing waste to it is an injury done to her and she must be joined in the suit: but if it is an injury to the use only as by injuring the woods, she is not to be joined. Now what has just been mentioned a time during the life of the Husband: but if the Husband die and the wife continues alive she then becomes the sole owner of the land: But suppose at the time of the Husbands death there were emblements still growing on the land: we shall have stated it is an interest, they are considered to be personal property and go to the Executors of the Husband. Suppose the wife dies in her Husbands life time: then her real Estate descends to her heirs at Law, and the Husband has no interest in it at all.

Co. Lit. 3.

Curtesy Tenure

Thus far has been considered what the Husband acquires by the Marriage merely he may have an Estate beyond this which is called an Estate by the Curtesy

In order to entitle him to this Estate he must have had a Child born alive by his Wife to be entitled to inherit it - The Child in this case must have been actually seized in order to entitle the Husband to take by the Curtesy and the Husband will hold this Estate by the Curtesy During his life and on his death the Child will have it in the same manner as if a child had been born (By the Tenure of Gavelkind it is not necessary to have any child born in order to entitle the Husband to his Estate by the Curtesy: And as the Tenure in Connecticut is Gavelkind under the Charter a question might arise anon at some future period whether a Husband is Entitled to

Dower

Devo. and Tenure

have been entitled to this Estate without having any child. The Common Law has prevailed and Judge Reeve supposes it is now too late to make this question. It was formerly made a question whether a man could be made a Tenant by the Curtesy in a trust Estate, as where an Estate is given to trustees for the use of the wife and she has the benefit and interest: but it is now settled that he can not be Tenant by the Curtesy in such an Estate. If a man marry a woman who has leased her lands for such a term he will have the rent only for he can not have the use since the other is entitled to it. And if in that case the husband die and there were arrears due or Annuities they go to his Executors. The husband has the rent in lieu of the use and on his death, the rent will go to his Executors. But if there was rent in ar-

Dicto of the 223
Reading 457
Dyer 9
Ld Raym 87
3 Atk. 388
3 P.W. 132
1 Atkyns 267
2 Atk. 47
1 Ves. 298

Co. 51
Noven 53

Lean

Baron and Feme

before Coverture the property to the wife in the husband vests as any other chose in action - At England knows it is given to the Husband by Statute - It will not be necessary to enquire what portion the wife has out of the Husbands Estate on his death: this arising first in the Paraphernalia: secondly in Dower and thirdly her joynture: The Wife may also gain some advantage by the Marriage - When the Husband dies intestate the Wife is entitled to one third part of his personal property after his debts are paid and if there is no issue she is entitled to one half of his personal property after his debts are paid - But their personal property may be devised away - There is one species of personal property which is not in this predicament and that is her Paraphernalia - Her Paraphernalia consist of her wearing apparel and ornaments - the second kind consists

Vide 552
Vide 552

4 Lecture

2 Kind

Heirs and Heirs

ornaments of her Husband such as Jewels Watches &c — As to the first kind they never can be confirmed as his property at all — they are not to be inventoried and will not go to his Executor: but are absolutely the Wife's property — Now Judge Reeve conceiving she can hold only a suitable number of them — 6a Litt

Concerning the second kind viz. Her Trinkets &c: these can not be seized away by the Husband: they are not only just to his Wife's use whenever he may take them from her at any time during Coverture, but on his death if they are not taken away before by him they vest in the Wife, and the Husband's Executor can not take them unless there were a deficiency of assets in his hands to pay the debts: for in such a case he may take them. But they can not be taken for the payment of Legacies or Distributions of any kind but only for the pay- 3 Atk 370.

Damon and Tenn

3 Atk 394 — of Jointure Debts &c. Creditors

Suppose a Husband settles an Estate
such and dies, And the Widow loses the
aid of the personal property to redeem
3 Atk 395 them and she elects to prefer it before the
Estate for the Purpose = Suppose Lands are
devised to pay Debts if her Paraphernalia
are taken she will stand upon
Election and may compel a Sale of
the Lands to relieve them

5 Co 83 n. 80 in a note
1 Atk 389
1 Ch Ca 129
2 Vern 744 — Plate is where her Paraphernalia
are taken pledg'd is inferior to other
Creditors but superior to Voluntary
the Court of the State the real Estate
constitutes a fund for the payment of
Debts but the personal must first be
exhausted this brings the case a ques-
tion may arise whether the Wifes Para-
phernalia could be taken to pay Debts
could both the real and personal Estate
was exhausted, and [redacted] it
would seem upon principle that they could
not

Parson and Parson

be taken before both (Real and Perso-
nal Estate) and exhausted - In this
question we find no precedent of Per-
sonal Real Property in those States,
where it is found for payment of Debts,
similar to Real property in England when
devised for the payment of Debts, it un-
questionably must be taken and exhausted
before Contribution can be taken:
Judge Reeve conceives that the Real
Property must first be exhausted

The wife also on the death of the Hus-
band becomes entitled to an interest in
his Real Estate and this interest consists
of one third part of all his freehold Estate
of which in fee simple or fee tail ~~or fee tail~~
(by the Common Law) it must be
one third part of all he was seized during
Coverture. This Estate is called the Wife's
Dower - The Husband can not deprive the
Wife of this Estate by his will or any
conveyance during his life time unless the

Wife

3 Pr Wms 342

4th Lecture

Par d'ma Tenure

wife were in the Husband necessary that there should be an actual seisin of the Husband to entitle the wife & her Issue a right to demain &c but an inchoate & imperfect seisin in order to entitle the Husband & his Estate by the Curtesy. And further it must be such an Estate as her issue if she had had any might have inherited: otherwise she can not be endowed: Now you will remark that it is not necessary that issue should be actually born, as in the case in Curtesy: But the only enquiry is whether a Child could have inherited if such one had been born: Now this Estate can happen in a fee Simple Estate but in a special intail must be so alle if not always: This Estate of Dower is not only out of the power of the Husband to defeat away, but it is out of the power of the Creditors, & if they take the land they take it with the

in

incumbrance of Dower when it shall be done will have it after her death in the same manner as it will be referred to Wars: So that there is little difference between the Husbands Real and personal property tho the Wife at present in the death of the Husband: but in case of Real Property the Law as before only Against personal property is liable to be taken for the payment of the Husbands debts, Whereas Real property is not = By the Common Law the Heir at a certain given period is obliged to assign after the death of the Husband the Widow her Dower and if he refuses he is compellable to do by legal process = The Statutes in the different States have made some small alteration on this point = In Connecticut the Judge of the Court of Probate appoints two or three Commissioners to set out the Widows Dower in metes and bounds

and

and a confirmation to the heirs of their powers to the Court of Probate giving the title to the land for her life. An appeal lies from the Court of Probate to the Superior Court in Connecticut only the wife is entitled as her Dower only to one third part of the real Estate of which the husband died seized, and not of one third part of real he was seized of during Coverture.

Dower may be barred in several ways. 1. If paid a Dower may be barred by the Husbands being an alien. How an alien can not be Lawfully seized of land. This then means simply that when an alien purchases land & dies intestate & dies seized of them it being presumed that he is an alien and incapable of being invested in such a case the wife can not have any Dower out of them for an Alien can hold his lands only during pleasure to be taken from him when at any time prior to his decease. Dower may also

be barred by an Elopement of the Wife with an Adulterer: & it be reported this her right to Dower is restored — if the Husband receives her again and treats her as his Wife —

Co Litt. 31
4 Co. 1. 2

(But the most usual way of barring Dower is by settling a Jointure on the Wife — Now this Jointure must be settled upon her before Marriage when she cannot be supposed to be under any coercion of the Husband: and she must also agree that it is in lieu of Dower. This Jointure must consist of Real property it can not consist of personal property: as it must be either for Life for her own life, it must also be so created that she shall be entitled to the enjoyment of it on the death of the Husband — Again the Jointure must be a "Competent Livelihood" and generally it must be proportioned to his Fortune and her part in life — Should there arise any

any dispute as to the competency the Court are to determine. This Jointure
(1 Atk 603. must be conveyed to her and not to trustees in use for her? How is a general rule that after a person has once made a bargain he can not recind it, or have any relief whatsoever it may prove to be a very bad one. But if the Wife has made an improvident bargain concerning her Jointure the Court will in Equity relieve, contrary to the general rule respecting this Contract and give her Dower. And this is founded on reason for the Wife is not supposed in a situation to make a good bargain at the time of Marriage. The Court will therefore relieve her.
It must be observed in the Statute that it is in lieu of the Dower for a Wife, it might be considered merely as a Marriage settlement which is no bar to Dower. A Jointure is sometimes settled on the Wife after Marriage. How if there

there were Articles of Agreement entered into by the parties before Marriage that a Jointure should be made after the Marriage: then a Jointure made after Marriage in pursuance of this Agreement is as good as one made before Marriage: If a Jointure is made after Marriage without any such Agreement the Wife has her election either to take this Jointure or the Dower: But she can not have both: An Acceptance of one of them consequently will bar her from recovering the other. Formerly the Wife was endowed ad Ostium Ecclesiæ with the personal property of the Husband: Now in those times she held this personal property absolutely in the same manner as she now does the real Estate in Dower: But this Law is obsolete. A Legacy given to the Wife may bar the Dower but it must be expressed to be in lieu of the Dower, and then the Wife has her election either to take

Eq Ca Ab 218
2 Ven 345.
3 Atk 630
4 Ves 752
Co Litt 36.

Baron and Feme

take the Legacy or to take the Dower.
There is one practice which obtains in most of the States and which Judge Reeve conceives to be a very bad one it is this - the Husband in making his Will says "I give my Wife one third part of the real Estate during her life" without stating that it is in lieu of Dower. Now it ought to be explained that it is in lieu of Dower in the Will, for in otherwise of Law this may be explained as a Legacy merely and she might take another third by due course of Law as being her Dower - In Maryland the Court of Chancery in Connecticut have been governed by the supposed intention of the Testator and have allowed the Widow no more than the one third expressed in the Will: but Judge Reeve says he does not know how a higher Court would consider this - There is a case in the 3. Atkyns 8. which has been supposed to be opposed

to

to the general principles as to Dower
In that case it is clear that Chancellor
King held that if a bond was given in
trust for the support of the wife it would
bar her of her Dower provided it were a
sufficient bar at law: Now nothing more
is meant in this case than that the
wife may have her election either to take
the bond or her Dower: and that if she
does take the bond it will bar the Dower &
yet that she is compellable to take the bond.
for clearly she is not. It has already been
observed that the wife must join in the
conveyance in order to bar the Dower. So al-
so she must join in a mortgage & it will
not affect her Dower. The wife may redeem
if the Husband's Estate was mortgaged
before Marriage, the wife must redeem
before she can be entitled to Dower.
When the Husband comes to pay his part of the
money he means not pay the Interest:
On sale lands are Mortgaged the Wife

must

S. Vetere

D. 64,1134

Power and Trust

3 Ves. 52. must pay one third and the Heir two thirds of the redemm = If Lands settled as a Trust should be Mortgaged the Wife may abandon them & resort to her Dower: & she must redeem them: and the Heir in this case must pay the whole of the money together with the Equitable interest before he can take it from her

A Wife can not be endowed with an Equity of Redemption: neither can a Mortgagee Wife be endowed with an Equity of Redemption: nor can a Mortgagee Wife be endowed with the Trust which she has in the Mortgage: now not giving the Wife Dower in the Equity of Redemption is certainly overturning the Symetry of the Law and so did Sir Joseph Jekyll Master of the Rolls that she might be endowed of it — (But this Decision has since been overruled: This is a case in which Judge Reeve says he should not hesitate

1 Eq. Ca. Ab. 727. Bunn 26.

2 P. Wms. 252

to

I may prove Eagle's Devise, for in any
event, there is no principle in this:
In this State they have decided that the
title can be endured by the Party of
Description - The Life of a Mortgagee
in certain funds have been can not be
encumbered, though for sum the right
of Life can not be encumbered of a trust
Estate. —

Can not be in Scotland

I must will be entitled the right of the
Husband to the personal property of the Wife
which accrues to her during the Coverture
such as Legacies, Damages for injuries to
Person &c. There are two different opinions
below on this subject: one is, that any
personal property accruing to the Wife
during Coverture belongs to the Husband
absolutely whether he reduces before the
death or not - The other opinion is that
such property is the same as any other
choses in action belonging to the Wife be
for Marriage and during the Cov-
verture

In Scotland

Brown and Fane

Doe ex dem Gallett et al his Lessee and it would be void as to the Wife or to her Representatives and not to his Executors.

(But they all agree in this that the Husband may institute a suit in his own name to recover such choses as accrue to the Wife during Coverture

For the case in support of the opinion that there is a Power to the Wife or the Death of the Husband without devesting on his part. Vide Marginal Auths. And for the third point viz. That they belong absolutely to the Husband, whether recovered or not: and which Judge Comyns mentions to be the true Doctrine (Vide Comyns Dig. 355. Where there are cases cited to support this Doctrine = Now this is a question most which we can reason but little if at all: But I say there are important rules of Law in this point: Viz. That a Wife destroys the Property of the Chat-

Vide 2 Vern. 396 2 P. Wms. 291

may

Marriage Settlement

[illegible] on the other hand will be prejudiced
the Legacy of the Sum to be carried
There is no other reason in support
of this Opinion which is that the Husband
as in Equity we call having married
the Lady in his own name and he
never did join his Wife could have sued
them which is always the subject
which is always to be [illegible] when
Suits brought & recovered by or to the Use of the Wife
into the Power of Marriage & Must will be
considered the legal right of the Husband
as to Damages accruing from injury
done to the Wife before and after Mar-
riage: as by beating her person: Slan-
dering up her reputation &c - The Husband
must join in the Suit whether the injury
done before or after Marriage -
For all Damages accrued from injury
done to her before Marriage their Hus-
band is entitled to them and if he collect
them

Brownlow v Tower

1 Brownlow 205
Yelv. 300
Yelv. 89
1 Jac 501

Lane during the Coverture they belong to him in Equity. If a Lease be made of the Wife's Land for 3 Lives & she dies the Life of the Husband & Survivor to the Wife. If the Husband & Lane during the Coverture & Damages taken & paid if he attorn but Land is not actually known they Survive to the Wife. If he due to recover & dies before Judgment

Cro Jac 30.
2 Ch. 90
Salk 119.

Out of this transaction of plundering and beating the Wife there arose two several actions: the one has been already mentioned viz. That for Damages by the Husband in his own name for the Damages which he sustains in the Life of his Wife & Children and for Loss. This is an action of Trespass per quod consortium amisit and per quod servitium &c. for all the expences which he might have been at in Cure and in this Action =

How these special damages recovered in this case do not go to the Wife state but belong exclusively to the Husband.

It also in some cases the Husband may bring a special action in his own name against any person, who plans any thing in writing or may work a great injury to him: as in case he is an Inn Keeper and the reputation of his house depending in a great measure on the character of his Wife: if she is abandoned it works an injury not only to her but to him also = The Husband is also entitled to all the property, which the Wife obtains by means of her talents or employments by reason of which she acquires property The Husband has an interest in the labour and person of his Wife and if any person seduces or takes her away from the Husband it lies for the Husband to bring an action against such person to recover damages for the injury sustained

Salk 206. Lev. 40 1 Sid 346 Cro Jac 501 2 Rolle 156 Stra 944 1 Show 94

Power and Force

Put on the other hand the wife has no right to the person of her husband and can not therefore maintain an action for the loss of his services. There will be considered the injury and the remedy in case of criminal conversation with a man's wife. The action to be brought in Bucks v. Cafe & in Gould (Trespass vi et armis: but in practice by case as this action on the case or damages, for the recovery of the wife - formerly it was held that there must be a recovery at all events, but it has lately been adjudged that if the husband is poor & the seducer can give his agent bail nothing can be recovered - Of the husband and wife are to be jointly and distinctly and distinct pleas pleaded are traversed and issued to the plaintiff can maintain no action for the injury committed after the divorce as he has renounced her society - If a man abuses his wife a man can commit

no to

take to his wife when living separate under articles of agreement. Judge Cowen conceives he can: but Mr. Paulding thinks not. — In proving Marriage it is necessary to prove it in point of fact: by reputation is not sufficient. With respect to the damages in this case, the character of the wife before Marriage must be considered: So also if the Husband kept dissolute company at his house, this will diminish the damages.

The Power of the Husband over the person of his Wife

There is no settled rule as to what they formerly: formerly the Husband had the same power over her that he had over his servants. During the reign of Chas. II. the wives began to be considered as worthy of better treatment than mere Slaves & since that time have been treated in a kinder and respectful manner. The Common Law of England & like

claims

Vide Lord Raymond case State Trials 1 Volume

4 Burr 2057. 1 Bl R. 632. Dougl. Bright vs Barlow Bul. N. P. 28.

claim the right of chastising their Lawful Wives by not as among any people of Civilized Nations in the United States

The right of Husband for ill behaviour

This right the Husband and Wife both Infants and by the mild action they can have against each other they will be conducted Lunatics &c It seems that if a Wife shall go away from her Husband without a cause he would have a right to seize upon and detain her tho it was said that he may imprison her so as only to prevent her going away with an adulterer and also to prevent her conveying his property But it is clear that the Court will not compel a Wife to leave her friends & the Place from the cruelty of her Husband

Str. P. 875. 478. 1 Hawk. 130. 1 Salk. 113. 2 Lev. 128. Str. P. 1027. 3 Bar. 1822. 4 Bac. 1791. Mod. 834.

Of the Husbands liability to pay the Debts of the Wife due from her before Marriage and also his liability to answer for Torts and Wrongs committed by the

before

and after Marriage [illegible] As to her Debts
Something has already been said on
this subject in the first Lecture:
By the Common Law Husband seems
liable to pay all the Debts of the Wife
contracted before Coverture. As to any Her
Engagements = Her Liability lasts no
longer than during the Coverture: if there
are Debts due from the Husband or the Wife &c
when the Debts are paid in Discharge the
Husband and the Executor = This Liability
does not depend on the fact whether the
Husband received any thing with the Wife
or not. Consequently by mere operation
of Law Creditors may be defeated of their
just Dues - The true Principle by which
the Husband is made liable to pay the
Debts of the Wife is that a Wife can not
be sued in a Civil Suit without being
joined with the Husband: Neither can
She be imprisoned, unless the Husband
would have been liable for Civil Actions = Of the Com-

1 Roll. 351
5 Mod. 184
Salk. 64
3 P. W. 404

Law

and Wife are interested and the Husband dies, Pend. the Wife must be discharged = If he is not to be found, she can not be imprisoned &c when Process is against Husband & Wife = There is no case in which the Wife may be imprisoned without her Husband and that is where a feme Sole is sued and then marries: in that case Judgment will go against her in her Maiden name. So to Bump Execution then must be sued against both Husband and Wife: and if the Wife is taken and the Husband afterwards dies must be discharged =

D St P 107 10 Pa Vents 49 Lords 124 Barnardiston 96 2 Bl R 720

1 Sid 395 Vent 5

6 Taunt

If a Husband and Wife should be sued on a Debt & the Wife, before Conviction and after Judgment, the Wife dies in this case the Debt may be collected from the Husband: but if the Wife during the pendency of the Suit it will abate because the Debtor is dead: this is indifferently an Exception to the rule, though it is not technically

2 Str 33

Of the Husband to the Wife

The Husband is obliged to the Wife
only to cohabitation, and to the like
duty during the marriage as the Wife
to the Husband. The Wife must be kept against
her will, but she must be kept.
The one thing is the only thing wanted
to make the Husband die before the
wife. The Husband is not liable for any debts
of the Wife contracted before the
marriage, but he is liable for debts
contracted by the Wife during coverture
for necessaries suitable to the Husband's
circumstances and the law is
not a personal injury or tort against
the person who commits it, this is settled
and not even state of the wife can bring
action for this injury in tort. The husband
can not be sued in joint action. The Husband
is liable for torts committed by the
Wife after Marriage. But the husband

Person and Estate

or the Bible alone for them? In this case
there may be cases in which they may
let the Bible alone in which the
character is liable the grounds of inevitability
there may rely on the question whether it
may be supposed that in such the
Husband, a married man is a person
and the wife is supposed as the
more agent in this case and the husband
does not [illegible] The rule of the two persons
or part in connexion with the Husband
in the name and person in the
life - But the Bible, Scripture & Pa-
ter [illegible] only in the Marriage
one person or one another & is
inviolable act and in law it [illegible]
[illegible] [illegible] in which the
life is received that she is entitled to
act under the Covenant of the Husband.
But while the Life remains the last
instant the Privileges of the Christian
may practice them by the exercise and

of

or in the conspiracy, in such case they are both liable to the Wife's crime and it will be the duty of the Husband to prosecute her but on the death of one not survive against him.

Thus far has been considered the private injuries or duty of the Wife. Now will be considered the liability of the Husband for any offence the Wife may commit against the Public. The rule is, that where the punishment inflicted is no other, or more than a fine the Husband is liable with the Wife and they must be found in the suit: but where it is imprisonment or corporeal punishment the Wife alone is subjected, for in the one case she has all the means of making satisfaction = An Action for the recovery of a penalty is an Action of Debt & the Wife & Husband for a penalty the Husband must be a party to the action = The general rule that they are

Rex v Upton 3 Burr 1935
Co Lit 351 a
Co Litt 133 a
Co Litt 180 a
Co Litt 351 a
Co Litt 68 a
Bract 3

Women and Crime

any duties which were incumbent on the Wife & children from the marriage, the Husband is entitled to the Issue of her Accounts. So if a Woman has Property before Marriage and it certainly may & she has Property and then has none till Married to the Marriage & liable to maintain them. If she was a poor person the Husband is not bound to put out her Children because it was not his duty before Marriage but the duty of the time She being a Widow

There is one exception to this general rule in the English Law and we have it found it. Thus if Mr. Mary who has a Wife & Children but a Wife Parents and Children. Now if on his death bed he should commit to take to put out Mary's Children but if others are the case he is not bound to put out them but the Children

must go to

Coram Curia Feria

Scavage Cocus Wands the Custom of the City
Preserve Domestic Tranquillity. There is
a similar Custom mentioned
There is a Case reported in 1 Ld. Raym.
upon the Question whether Persons
keeping Shops may shut their Doors
and not accord with the Custom, before
Fair allowed and which Scavage Cocus
conceived to be correct
The Statute of Philip & Mary enacts the Duty
of Children to maintain their Parents
There is no Common Law on this Point
but by a Law of Nature that a Parent
is bound to maintain his Children
There is one Case in which the Husband
is bound to fulfill the Wife's Contract
made by her before Coverture after Co-
verture it is at an end & they is an insu- 15 Ed. 2. Fitz. Nat. Br.
fatid Case - (vide marginal Authority)
How will be considered in what a Sense the
Wife is accepted to Law the Law considers
a Feme Covert in Conformity with Her Hus-
band:

Parsons Case

and 1st when by an Act of Parliament he alone is liable: & also when the Offence is against the party himself & therefore he alone is liable. But they can not extend to every thing which would have been done in a State of Nature. As Coverture for there she alone is liable

Hawk. P.C. 1 Hale 45. 47. The Wife is also liable for treason: and there is one case in which they both are liable viz. Receiving a Traitor

A Wife can not be made an Accessory 2 Hawk. 28. after the fact in taking an Original Contract made by the Wife are binding on the Husband & not on her

A Wife can act as an Attorney for Husband therefore if a Contract is made or an act done authorized from the Husband, he is bound by it: the Principle here is that he confirms to the Contract. and Debt, Indebitatus Assumpsit for

The Husband is bound by the Contract which it is made in the Wife's name

for

to claim to satisfy the presumptive Law Ibid 128
on the presumed grounds that he had given his consent

3d The Husband is bound to fulfill a Contract
of the Wife which by public use and as Wives Vide 3 C.
according to the custom of the Country in Sid: 20
similar circumstances than if the Wife got a Stiple 345
Bill and bought goods as is usual
for a Wife to buy? the Husband is liable
to pay? and must by the Wife regard
must to have a Wife standing in Society
thus, the Wife of Peasant should pur
chase the most elegant trappings for a
horse. the Husband could not be liable
to pay? he and them who perhaps the
Husband of a Wealthy Merchant would
be bound: regard must always be had
to the circumstances of the Husband and
his rank in life. But on the part the Wife
may be bound in the Husband of
purchasing things actually found for Wives
& Wife: The Authority of the Husband
ceases

would not be liable in such a case but Judge Crawn contra, he would on the Country — 4th The Husband is bound by every Contract made by the Wife by Fe. use and custom & so is bound notwithstanding if a Wife alone purchase a Piece of Land and the Husband should on Action be would be liable to pay for them: taking benefit of the purchase Jurnisby contra that he ratificd it — 5th The Husband is bound by Contract of the Wife which generally he would not be bound by save it but arising in certain peculiar Circumstances Viz. the Husband goes into a foreign Country here the Wife may carry on the business & her Contracts will be binding: Secondly if the Husband at Home & acts of the Husband is inconsistent to transact much Business & to stay mainly at the Wife, she may contract and the Husband is bound by the Contract

Vide 38 Ed. 129. & Stat. 345.

Marks and Time

If the Husband is bound for the Wife's Contracts for necessaries when he refuses to afford her any? Thus John Stiles turns his Wife out of Doors and she not having furnished herself with necessaries: Now he will be bound by this Contract even though he publickly forbids any person to trust her and should swear by all the Gods that he never would pay a Shilling for her even if she was not actually turned out of Doors but she has good reasons for departing: in this case also he is liable to maintain her notwithstanding his forbidding any to trust her. If she departs without any reasonable cause he is not bound to pay for her necessaries: if she comes back again he must maintain her: If she elopes with an adulterer the Husband is not bound to pay for her necessaries nor to maintain her if she returns. If the Husband forbid his Wife from purchasing a Mantua &c. but tells her he will pay for

for a Calico one it seems he is not bound
to the purchase the first one: title
however as before said her dower of
life in the grantor: if the husband re-
ceive his wife after an elopement with
an adulterer he is bound for her necessa-
ries even during the time of her stay.

4th Lecture

Suppose the wife elopes with an adul-
terer and contracts for necessaries:
it said in the books that the husband
would not be liable for them even if he
did not know that she had eloped
for eloped: Now Judge Reeve conceives
this decision is not grounded on principle
for if the adulterer, that is here a tenant took
it away immediately after he was dis-
charged from the action that the hus-
band is liable for the restitution of them (re-
lation is not a material circumstance): Now
it seems to Judge Reeve that the case of
the tenant is precisely in point as the
case of the goods: the wife in one case

case would not a Bill lie for this
evidence: If a Wife who is an Adultress
lives with her Husband he is bound by her
Contracts &c as usual. Ld Ch. Hardwicke said
that there is a case in Bonnegrette and
Tiller 226. in which it is held that the
Husband is not liable in such a case
But that case differs from the present
the Husband left the Wife and she continued
an Adultress. Though perhaps
receive even in this case it would be hard
provided the person who furnished her
with necessaries did not know her situa-
tion: but that she was an Adultress and
that her Husband had left her
It is a rule of Law that a wife of she elope
with an Adulterer is barred of her right
of Dower: if however the Husband receive her
again her right of Dower revives. She is
charged & her disposing by her receiving
of the Husband and Wife seperate by
mutual agreement and the Wife have

separate allowance: the desertion is an act of notoriety the Husband is not liable for her Contracts though made for necessaries: How this proceeds on the ground that the separate allowance is sufficient for her support for if the wife is liable she can have no property and there is a desertion: in such a case if the wife is able to earn by her labour sufficient for her support, the Husband is not liable but if she is not able to support herself by her labour he is liable. It has been objected that a man could not forbid persons trusting his wife for necessaries in certain cases: How this must be understood with some restriction for the Husband may forbid some particular persons who may be his enemies If a wife should purchase necessaries in spite of her Husband and should sell a piece of land the Husband is not liable Lord Kenyon says he can not recover for

2 Stra 954 Sach[d]s. 8

2 Stra 1207 2 Show 283

for the ground of the decision only is
that they must come to his age in order
to make him liable: & if they infants
are incumbent at the moment of the pur-
chase and Judge Buller says he can not
conceive how any misconduct of the Wife 1 Salk. 118
afterwards can discharge him
A Wife can not bind her Husband by a
Deed in her own name unless it be by a
special authority given her as by a pow-
er of Attorney &: it would not bind him
if the deed was given for necessaries but
the Husband would be liable in an action 6 T.R. 603
of Assumpsit: at Contract for money
loaned to be paid out for necessaries
would not bind a Husband in a Court
of Law. But it will bind him in a
Court of Equity. The rule in Equity Judge Sm. L.C. 38.
Buller thinks should be adopted in Courts of 1 P.W. 181
Law for it is the correct one. 554
If the Wife is committed to Prison for a Bull. N.P.
crime, the Husband is not bound to pur- 27 mod. 28
28 Salk 286
nish

Co. Litt. 351 a. 2 Roll. Abr. 88. 2 Ves. 444. 2 Ves. jun. 572. 2 B. C. 106.

her death necessarie but the Debt remains as it

If the Husbands Debts due to the Wife at the time of Marriage

Upon the Marriage the Debts are all paid or liquidated, for they are at the Husbands disposal and are also in his possession But supposte a Bond or note is found after his death in favour of the Wife against him how this running to the Wife against her Executor this Covenant must be understood with some qualifications the note bond &c must be exhibited or alive after his decease or they must have been given before Coverture If there is no good consideration the Wife can not recover. The wife must consider such Debts as are to be paid after the Husbands death

Co. Litt. 351 b. 5 T. R. 654. 2 Ves. jun. 510. Comyns 62. 5 T. R. 360. Salk. 52. 2 Vern. 80.

Agreements entered into by the Husband and the Wife before Marriage, provided for her after the Husbands death are binding at Law and Equity Covenants

Broad v. Jones

they were liable only in Equity & that is otherwise with the Wife in Equity; considered such a Creditor as that she must be paid before other Creditors If a Husband make a pharriage settlement on his Wife now she elopes with an adulterer & such settlement binding on him? The Common Law was the Marriage the Husband is the Consideration was not that she should continue faithful to the Husband but simply that she should marry him why she did Lord Keeper Bacon conceived that she must 3 Ch. R. 108 cease to be able a Bill in Chancery for Alimony

How will be considered these Contracts respecting Real Property made before Marriage, or a Conveyance of Real Property by the Husband to his intended Wife of Conveyance of this kind by the Husband to his intended Wife, is binding on him after the Marriage? Upon this point in the same manner as a Jointure before Marriage

entered

Powers and Forms

Co. Litt. 112 conveyed to her so that he can have the use of it but by the Common Law after marriage how is a man in Common Law that a Husband and Wife can not contract together after Marriage because it is said "they are but one person in Law" now this is true as it respects personal property but respecting real property they certainly are two seperate persons for a deed of land to her does not vest in him but in her and he can only have the use of them.

Now in obedience to this maxim it seems to have been a rule of Common Law that a Husband and Wife could not convey Real Property to each other.

Co. Litt. 112 b. It is settled that a Wife can not convey Real Property to her Husband during Coverture. Formerly the Husband could not convey land to his Wife but a plan was contrived to save trouble by conveying to a third person and then he conveyed to the Wife.

and

and this was all on the ground that H. would convey land to Tobey and Tobey would convey it to Susan the wife of H. immediately: Consequently a Husband may convey real property to his wife in this circuitous course: But now by the Statutes of this Commonwealth can a man directly convey land to Thomas Tobey for the use of his wife: now as soon as this is done the Statute vests the title in the Cestui que use who is the wife: John Tilly There is no such rule in Connecticut but the old method of conveyance to a third person is in use: & they be convey to the wife — Co. Litt. 112 2 Inst. 673 2 Co. Rep. 785 Plowd. 111

The Husband can not convey personal property to the Wife though he may in a Court of Equity an Agreement entered into between the Husband and the wife of her Marriage, that the wife shall have certain Articles and have the benefit arising from the sale of them is binding on 8th Lecture 31 N. H. 337

the Husband

Baron and Feme

Covenant. A voluntary promise by the Husband that he will at some future time allow his Wife such pin money as shall during certain Articles to her own Trustee can at the same time in a Court of Equity. Articles of Agreement entered into between Husband and wife before Marriage.

The English Law on this subject will be mentioned: but whether it is recognized in the United States, your Lordships may be not known. As these Covenants the parties are bound by all the legal Covenants entered into. The Husband may renounce all Marital right, and so far as he can renounce them he never can reclaim them. So if the Husband and Wife agree before marriage he may renounce all right to her person and nothing more. By the Covenant to allow her a Separate Maintenance he is bound by it: but in the case of a Legacy should come to her it does not belong to him. So if land descend to her

Dunn and Dunn

is entitled to the rents & profits of them. So if
he covenant to receive the property
coming to her he is bound by it. And if
some one have given them in all
these agreements nothing is to be taken
by implication: every thing
must be expressed. He can suffer no
injury which may be afterwards prevented
after coberation. He can not seize upon
her person and if he attempt it by a
writ of the peace. Neither can he re-
cover for any criminal conversation
with her after coberation. So a wife can
convey real property without joining
with her husband in a fine provided he
has renounced all right and title to
her person and property.
For the Doctrine of Separate Estate
Peacock Pidcock 8 Mod. 24. 2 Com. 85.
Durnford 482. 502. 497. Ex. 61, 514. 496. 3 Br. Ch. Ca. 614
There is a case of this kind in the 2 East 83.
It was an agreement to provide for the
support

Str. 478
Salk. 121
Compton
&
1 Atk. 348
6

2 Vent. 217
2 Vern. 679

assent of the Wife, provided it should afterward be necessary for them to be private: and this Agreement was held binding. — Now in all the cases of separate maintenance, the Wife is considered as a Feme Sole except as to marrying again: & it has been said that after separation the Husband has the power to alter these Articles: but, nothing except a Material Agreement to again will be a discharge of the Articles:

3 Br. C. Ca. 384.

2 Vern. 286.
Bl. Abg. 497.
1 Str. p. 478.
2 Eq. Ca. Abr. 511.
2 Bro. Ch. Ca. 90.
3 Atk. 547.
2 Bro. Ch. 393.
3 Br. Ch. 614

The Wife is incapable to bind herself in point of obtaining her separate maintenance

Contracts by which a Wife may bind herself during Coverture

It is a general rule, that the Wife can not Contract so as to bind herself: but there are cases in which she may. If therefore we can discover the true grounds which make this Contract void it will follow, that whenever this ground does not exist she may Contract and her

her Contract will be void the grounds which prove her incapable of contracting are these 1st the Husbands right to the person of his wife and 2d. The law presumes the wife to be in the power of her Husband therefore wherever we can discern that no Parental right of his is effected and also wherever we can presume her not to be under any coercion of her Husband the marriage Contract and her Contracts will bind her. These will be mentioned more at large in pursuance of the two rules which may have been premised to be attended to.

1st When a man may banished the Realm here the wife is permitted to sue and be sued as a feme sole not under the coercion of her Husband and her marital rights affected by her Contracts. It is said in this case that the banished man is Civiliter Mortuus but this is not so for the wife can not marry so long as the Husband lives

Baron & Feme 66
Plowd 456
Co Lit. 133
Co Lit. 30

Parson Aim Term

2d Can a person against the Statute which is a term of personal punishment for he never can return again. Now in the case the Wife of such a person may contract, and her Contracts will bind her then the same reason as the former case it also by said the Wife of an alien may contract on the same ground

Against the Wife of a man transported if it be for seven years only may sue her and be sued by her Contracts, and is bound by them if she returns

How will be mentioned the case which is said to determine the great question Viz. That a Wife can not sue alone being on a Deposite transportation, first will be noticed the leading case on the subject which since Year seven may receive another Construction through an different ground from that which the Courts of Law in all cases of this kind can not be the Wife contracts for necessaries

and during this time of separate main-
tenance she gave a bond and afterwards
married. She gave a bond and afterwards
married. The bond was afterwards put in suit a-
gainst her and her Husband, and the
Court decided that they were liable to pay
the bond. But it was said they were in some
sense overruled by a variety of decisions.
Now Judge Clark says he agrees, that it is
overruled in this last decision in this suit
but grounded the Court in this case of the
bond, grounded their decision on the ground
of separate maintenance and it seems
they did. But the Judge contends that
the decision was founded on the Cove-
nant to live separately, which is true,
but grounded the decision has not been o-
verruled. The Covenant to live separately
is the proper ground of the decision for
it follows in such a case that the Husband
has renounced all right to her person-
al labor by the virtue any exercise of the
Husband.

Baron and Feme

Now will be contained those cases which it is contended overthrow this in Cornwallis. The first case is in 2 Blk. Reports 1078 = the wife in this case was cured and the Husband Convicted: the Plaintiff admitted it but replied that She had eloped to this the Defendant & the Court said the Replication was insufficient = Now in this case the Husband had never abandoned his right to the person of his wife on the contrary he had a right to reclaim her at any time consequently this case does not shake the doctrine = here there was no Covenant to live separately = The next case is in 2 Blk Reports 1995 = In this case there was voluntary alienation and a deliberate maintenance = But there was no Covenant which could prevent him from recalling his wife = He could put a period to the Defendants protection at any time consequently this case is not to the point in Question

Ld. Raym. 1079

Str. 635

The next case is in 3 Term Report 766
In this case an action of Trespass
was brought against the Wife for money
paid to Her. She pleaded Coverture
and the Plaintiff replied that she was
an Adultress and that her Husband
had left her. The Court said the repli-
cation was ill. Now there is no Co-
verture in this case consequently it is
not applicable to the Durnford case.
The next case is in 3 Term Report 796
This case is similar to the last in one
respect Viz. there were no Articles of
Separation. There was a suit pending
for a Divorce before the Ecclesiastical
Court and the Wife had a temporary
Alimony allowed her during this Suit
only. She was sued and pleaded Co-
verture and the other was given in a
manner by way of replication: and the
Court said these facts were not sufficient
to make her Liable

the next case I am to Lawn Reports 604:
this was a case where the Wife separated
from her Husband and carried on a
trade She made a Will and died
a suit was commenced against her
Executor but the Court held the Plaintiff
could not recover as before
there was no Covenant in this case
The next case is 8. Term Reports 545
and in this case Judge Rowe admits
from the reasoning of the Court, that they
intended to overturn the case in Burn-
ford: Yet he contends that this decision
in Lechmere & Lechmere is not opposed
to the Barony case in Burnford
If this decision is founded on the ground
of separate maintenance the Barony
case is overthrown: But if it is on the
ground of a Covenant to live separately
then the former case is not overthrown
Now in my opinion concerning separate
maintenance has nothing to do with

the

The question resolves into the effect of it is to free the Husband from his liability for her Contracts - In this last case in the 8 Term Reports Judge Lawrence conceiving that the Husband had a right to reclaim his Wife at any time for it was like a Lease at Will both parties may put an end to it at any time - The Court however in this case declare on the ground of a separate maintenance and contended that the Barony case was overthrown - But Judge Lawrence conceiving we are at liberty to act the this question in this Country as we please - There is one exception to the rule that the Wife can make no Contract during Coverture viz. by joining in a fine or common recovery with her Husband to convey her own Lands: This she can do and the Contract will be binding: and this is the only mode by which she can convey her Lands

Chapter Four

11 Coke 4 S.
1 B. Abr. 348
1 Ven. 224.
Co. Litt. 55

There is known a statute of Henry 8. which giveth valid certain Leases made by Her and her Husband for three lives or twenty one years but not longer

There is no such one in Connecticut: in the United States there is no such manner of conveying land as by Fine and Common Recovery: but here the Wife may convey her Land by joining with her Husband in the common mode of conveyance. If the Wife suffer a fine in her own name merely and the Husband never disagree or object to it and die it will bind the Wife: and if she die, he can avoid it only for the benefit of obtaining his Curtesy. Now it may be asked, if a Wife can not make a Conveyance of her Land to commence after her Husbands interest in them has ceased? It is answered she could not by the two modes of Common Law: 1. By Feoffment Estate can not commence

in future but must commence in
Stanton - 2. Every remainder must
be created at the same time the particu-
lar Estate is whose determination it limits: but
here the particular Estate was created
at the time of Marriage: Though Judge
Reeve is of the mind that such a Con-
veyance might be made as Conveys
out for the Husband and none-away
by Statute - Suppose the Wife should
then come to her by Devise or
Descent: how can the Husband dispose
of it (or prevent the Wife from taking it)
It is settled that he can when given to
her by Deed - But there is no exception
which prohibits can when given to Him
by Devise or Descent - The same reas-
sons exist in these cases that do in the
case of Deed which is that it may not
frustrate the right for he may be obliged to
sue to get which he may think would
the value of the Land -

Excluded

A Wife can execute a power without her Husband tho power may either be a naked one or one coupled with an interest. 1st Concerning Naked powers. This is any power or authority given to her to dispose of lands or personal property. She can and may such land in her own name without her Husband; and if it is an authority to dispose of them to whom she pleases she may execute them to her Husband. So where lands are devised to sell this is a mere naked authority for she has no interest in them. It makes no difference whether this power was given to her before or after marriage.

Power upon Trust

2 Suppose she has not a naked power but a legal title or interest. As where it is made a title and given her lands to be sold. The being coupled with an interest can it be a good conveyance by the Wife without her Husband joining? The point has been disputed to determine it, let

to see why the Husband is conjoined: He is because he disposes of the Usufruct & the Law gives the Husband any interest in the Land? May he the Usufruct certainly puts some Elementary Writers say he ought to join: others that he ought not and Sir William Jones is quoted by both. The truth is in the case he was of opinion, that the Husband ought to join: but the three other Judges were of a contra to him. Hargrave says this is a disputed point, but he lays it down that the Husband has no interest in joining, but it may be a disadvantage to him & in consequence concludes that it is not necessary to join.

Sir Wm. Jones, Rep. 137, 157

Cotte

Of the Power which the Husband has to convey away the Real Property of the Wife

Now all the Husband can convey of his Wifes Real Property alone is the interest which he has in it and nothing more will

Sale

passes not even if the grant of a Convey-
ance is a fee Simple. So that on his death
the wife may enter on the land for a
life Estate and all the Husband had in
it was in her Real Property. But if she
join in the Conveyance it will bind her.
If an Estate is conveyed to the Husband
and the wife during Coverture and he
accepts the Estate this does not bind the wife
at all and she may agree or disagree
to it as she pleases after his death.
So if a Husband and wife join in a Con-
veyance that she is not obliged to make &
he dies it will return to her? they is not
Common wise; tis only voidable as she may
make it valid by an Agreement or if she
does not. A mere Parol Agreement
will be evidence to make it valid
So they say the Deed is not void, and the
parol Agreement does not make a
new one. If the wife accepts she is
Estopped from the Right

of a bond dower shall be forever barred
he does not mention it: that the wife
is entitled to the arrearages of rent incurred
during the life time of the Husband. If the
Husband is a lunatic it belongs to him and if
after his death it goes to the Wife. Same
Term binds on the remainder. Lease for
Coverture. A Lease is made to the
Husband and Wife during Coverture. Now
if she agrees to the Lease after her Hus- Roll. Abr. 349
band's death she must pay the Rent. Co. Litt. 26.
It is an incumbrance of Rent implies an
Agreement. Suppose a Woman was left
in 10 years and Marries and at the time
of Marriage she owed rent, now by re-
marriage the Debt and she must be Sued
with her Husband. But if she had
received during the Coverture and none
of them pursue her at the Husbands Roll. Abr. 349
death in this case the Husbands Executors Co. Litt. 26
must pay him. The Husband can
not release a Contract made by the wife
and-

Mem 529. and a third person before Marriage to take effect after his death. Now if he should contract with the Feme that if she will marry him and should outlive him, he will give 100£ to her. Yet she can not pleade it from this Contract because he has no interest in it - A Wife may suffer an Use for Life by the Covenant of her Husband - But if she enters she is seised and to remain by previous entry and Ouster, not performed. How if the Husband be bound to perform these Conditions, the Estate is left to the Wife - But where this Condition is annexed by Law and not by the Parties, the Wife shall not be injuried tho' the Husband neglects: (i.e. neglecting to take the Oath of Fealty

In what case the Husband must joine his Wife in a Suit - In all those cases in which the cause of Action could vest in the Wife the Husband must joine her in the Suit

For all her rights due before Coverture and for such as accrued in her Life time before Coverture she must be joined with her Husband in a suit: and the same might be said respecting an injury done to her freehold Estate personal or in reputation whether the injury was done before or after Coverture —

1 Bull. N.P. 61
1 Roll. Ab. 347
2 Bl. 337
Co. Ch. 445
1 Brownlow 205
Ld. Ch. 89

For injuries done to her person or reputation we have already considered the Action for quare which the Husband may join with her — The reason for joining the Wife in this case is this, that whatever the Husband recovers in this case is personal Estate and if he obtains it it belongs absolutely to him — But as they are alive before the action if he does not procure them to be reinstated during his life, they survive to the Wife — Now if he should die and obtain a judgment in his own name and then die, it would survive to his Executor whereas it ought to go to his Wife and by

1 Sid. 25.
1 Mo. Ca. 215
2 Jac. 501.
388
Co. Ch. 70

by [illegible] he and Adam[illegible] a joint
Tenement it wilbe— the Jenk[illegible] com-
tinue after the Husband Dr Riley
that if a Lond here given to a Wife before
Coverture the Husband may sue alone for
it— Why this petition is awarded which
is opposed to all Authorities Indeed Wm
may he have not— There is a case
in 3 Leon 69. and Allyn 86 which is
cited to support the petition but in
those cases we find that the Bond was ac-
tually given during Coverture— There
are also two cases which are cited to
prove this Doctrine neither of which
Judge Wilson conceives has any bearing
on this point— Neither can it show
how the same thing is also vested— All that
these cases prove is that when the property
of the Wife is actually vested before
Coverture and accrued During Cover-
ture the Husband may maintain for
or alone for it— and this is undoubtedly

3 Leon 69.
3 Atk. 9.

1 Ld. Ray. 187.

counsel

correct for any there had been no conveyance of the property at the time of the marriage, it vested in the Husband: but it is there said that the Husband might pass the Wife if he chose. 3 T Rep 608

Berry 676 is also cited. This shews that for Debts due to the Wife before Coverture the Suit might be joined with the Husband and that for Debts which fall in to the Wife, after her Husband's death she either may or may not be joined, but in the last case, the Chancellor says there is a petition on which Judge Rowe has already expressed his opinion and which he understands not to be Law viz. that if a Legacy is given to the Wife before or after Coverture, it will survive to the Wife after the death of the Husband 2 Vern 24

It is said that the reason why a Wife can not sue alone, is that Coverture is a disqualification: But it seems that this is not a Disqualification as 3 T Rep 627

if

if she were not in [redacted] cause thereof. For her Coverture alone the Wife alone in Trespass for an injury done to her personal property before Coverture can only be pleaded in Abatement = But where she is utterly disabled so that she has no right which the Law in any manner acknowledges, Coverture might be pleaded in bar as well as Abatement = Now this is a strong case for as it respected the personal property which by the Marriage vested in the Husband the cause of action could not Survive to the Wife = It may be objected on the other side that should the Defendant die before the Husband might join with his Wife and bring a Writ of Error and reverse the Judgment so as to avoid the Judgment as to Costs = Against to which it said that the Wife can not sue alone for a debt due to her and her Husband must but one person sue Because the Writ of Error and Judgment are supposed true, even the Husband

2d Rep. 2d

could not bring action in any case
to Suit forcing his Wife to make one
Party - Judge Reeve takes the sub-
stantial reason why a Jury Court can
sue one alone is that the Defendant
shall not be vexed by a Suit by a person
who if he gets the Defendant prevail would
not be liable to pay the Costs: and a
Jury Court would not for this reason
sue alone for property

Then Debt accrues to the Wife du-
ring Coverture, as if a Note or Bond is gi-
ven to her during Coverture the Husband
may sue in action alone or it may
at his election join the Wife - So if an
action, promise is made to the Wife
Indebitatus Assumpsit may be brought by
the Husband and Wife for Work done by
the Wife and the Court said it would
not lie for the Husband should have the
Action alone - Judge Reeve says in this
case also that it would not lie as well as

Lecture 2

Raym. 156
3 Keb. 403
Salk. 318
347
Carth. 84
Salk. 114
2 Ld. Raym. 779

in

in case of an express promise, made to the Wife. But the Court in that case distinguished it from the case of an express promise admitting that in the latter case the Wife may join with the Husband: but they say that the privity of the Husband will not warrant it.

The same might have been said, had an express promise been made to pay her rent; for there the reason would be an equal objection in all such cases where the cause of action does not accrue to the Husband sufficient to procure any reasonable judgment. Every thing should be confession that can be given in.

In what case the Husband & his Wife must either join or bring an action in his own name or to join his Wife.

The Husband can never join his Wife unless she has in some sort been concerned with him in the cause of action. So we see from the principle that in these

obey

case in which he not recovered by and the Wife the right as well be realized by a preremptory rule that she should not be joined: but it is not so: It may be laid down as a general rule that in all cases where the Wife or her property has been the meritorious cause of action and the Husband has sustained no special damage from such cause the Wife may be joined with the Husband in an action for that cause. It is evident that this rule comprehends many cases in which the Wife may or may not be joined as well as those in which they must be joined. (But when ever the person or property of the Wife was the meritorious cause of the action and that cause has occasioned no special damage to the Husband then the action may at his election either join or not provided the cause would survive to the Wife after his death.

Com Dig 203
Co. Lit. 215
399. 438
442
Bac Abr 761

he has already been shewn what those Cases are & it comprehends all prior to according to the Writ during the Coverture: & for rent accruing on her Lands and for trespass on the Land, injurious to the property only: & if the property is sold before Coverture and contracts afterwards the Husband may join the Wife in an action for it. The reason given for this is that by bringing in Action of Trover the Plaintiff affirms that the property is in himself: and here in Replevin and Detinue for the property if the Wife taken before Coverture, it is said that the Wife can not join with the Husband for the bringing the Latter Action / an affirmance that the property is in the Plaintiff: and if it is in the Plaintiff no part of it can be in the Wife for it was all vested in the Husband.

Perk. 353 Cart 76 152

Dower 33 Rider 42

Perk. 353

But perhaps in these cases where the Husband has his election to join or not the Wife he

D. 47

ney actually join in the action, they must sue them jointly in England it would survive to the Wife on the principle of Jus Accrescendi, but where the principle does not exist as in Connecticut it may be doubted. It would they may be directed in the name of the Wife but the question is whether she will not hold them as trustee for the Representatives of the Husband. Judge Swan thinks not for he is of opinion that it must be considered as a voluntary grant from the Husband to the Wife: he says he sees no reason why the Husband should join in the action unless it was to make a gift of the judgment to the Wife at his death 1 Kin 339
as he might as well have sued alone.

In laying down the general rules respecting the cases in which the Husband may at his election join the Wife there are an exception as to those cases in which there is from the cause of action a vested

Co Lit 301
1 Saund 340
1 Lev 140
150
1 Salk 206

damage to the Husband = These cases of special damage are for quod Consortium amisit &c. = In What Cases the Husband and Wife may at Defendant be sued jointly = The rule is that if the Action would survive against the Wife they must be joined = If a Husband and Wife have both been taken and but one person they can not join and bring an Action for it = The reason is, that the loss to the Husband is no damage to the Wife but if certain damages are rendered and taken of the Wife and certain for loss to the Husband, he may release the part of it himself and take Judgment on the part of the Wife = If the Husband & Wife join in committing a battery Judge Reeve supposes they can not be joined in a suit brought against them for it for it has already been observed that for battery committed by the Wife in the Husband's presence he alone is liable

(Vide 6 Co. Litt. 351 Roll. Abr. 348 Lev. 3 2

(Mod. 1528. 2 Lev. 24. 3 Keb. 115

But perhaps a Jointure would not prevent the Declaration: Suppose the Husband and Wife are sued for a Battery, and on trial it should appear that the Husband is not guilty and that the Wife is = Judgment could not be rendered against Her in such a case.

Com. Dig. title Jointure 1 Vol. 328.

A married woman may devise away her own property at Common Law. She however must not do this as to injure the Husbands Marital right = First I will consider this subject under the account of Authority = There is nothing in Marriage which incapacitates the Wife, for She may make a will and an Indenture: And accordingly notwithstanding the maxim, that a Feme shall be Covert: Again by a certain Conveyance She may give away her Real Property, if seised of it, by a Deed. But it is said it impolitic to allow the Wife to devise away her property

Power of the Wife to devise

for

for she may be under coercion: but the same practice may be made to other conveyances of this kind, as the Husband's conveyance which are allowed. It is also said that a Deed is of no force or effect when the Wife is more liable to coercion: so also is the Husband liable to coercion in such case. It is said in this conveyance the Wife is examined whether she act freely &c; but here when she goes into Court she will go with an intention to convey and she will invariably answer in the affirmative. But further why should the Husband consent be necessary when no right of his is in danger to be said or known to this that this practice will render a Deed by her alone good which is certainly against Law. But it has been found that the reason of the Wife being incapacitated to convey arises in the Common Law which does not exist in this Country. Surely she ought to be able

able to remand that wife has done away
thing to prounte her Rapheiah, and in
fact made her property =
Secondly for Wife confirm they subject
to legal grounds =
The Authorities say the Wife can with
her Husbands consent convey his perso-
nal property = This would seem to im-
ply, that without his consent she can
not convey his personal property and it is
true, but it must be remembered they
concerny his personal property, not hers:
It is said his Marital rights are affected
as he is Tenant by the Curtesy: This is an
objection for the Devisee takes it with
this incumbrance = If the Husband resp
by Real Estate it does not bar his Wife
right to Dower the Devisee takes it with
this incumbrance = The cases Judge
Howe concerny and analogy =
It ought to be remembered that anciently
it was rare for the Wives to enjoy their
Estate

4 Bac. 6
St. 89
Pow. Devises
Bacon's
Ab. 3 St. 3
Co. Ch. 351
. 376

3 Accords Rep. Eng. 2 Law 63

property according to said by the antient Authorities generally that a Wife shall not give by Will for that would be to leave the Husband forsooth. But the same Authorities say that Deeds for Debts and for Ornament after the Debts are paid for they are not Waste. Where the Lady properly it appears she might devise it. With the Husband power may endow the Wife but Efficient Devise this property she might devise. Lord Eyrnewood has laid down the same position that when the Lady properly she might devise it.

It is laid down likewise that a Wife can devise to her Husband Cloathes she may devise to them. Where personal property is given to a Wife for her life and separate use She may devise it.

It is said a man may not devise to his youngest son they plainly implying that he may to any other. This Custom

Devise

known & considered to particular things
Actually a Wife has no real property
but like the right of Dower & no person
can or please can sell devise even that
so that by clear that whenever married
women have property they may devise it
independent of the Statute. But it is said
County of Chancery only have given effect to
the Decay of the Wife & the County courts
so in opposition to the Law for the rea-
-son the Statute has given it they
ought to consider the Will as valid and
Surely Common Law is as binding as Sta
tute to pursue the
in a better point of view. The Wife
-dow if not reduced to possession
and return to that accordingly
in Ind. they may devise things in action
So it is clear that Coverture is not con
sidered as creating a disability to devise
If these principles are correct we should
say a Wife as Executrix may devise for
the

1 Pr. Wms. 124
2 Ves. Jr. 315
" 443
1 Ves. Jr. 267
2 " " 255
2 Ves. Jr. 35
2 Bro. Chy. 605
1 Bro. Chy. 10

1 Pr. Wms. 24
2 "

2 Peere Wms.
Brown 3
1 Roberts 608
Dick. 912

the property was not theirs to the husband and they in consideration receiving the Law

But by what we find in some part of the Law that a Woman may devise real property Judge Story observing that from the feudal times to Henry 8 no person could devise Real Property. The truth is previous to the feudal times a wife might devise Real property among the Saxons for they have adopted the Law of the Romans and they were governed among them. When William the Conqueror left to your particular District, his Custom, we find it is the custom in some places for Women to devise which shows that they were Law before throughout the Country — In Connecticut there is a Statute enabling married women to devise their own Property

It will now be considered how far marrying is a revocation of a will made by the Lady before Marriage —

Parson and Towe

It is said in the Book, that a Marriage is a revocation of any Will which the Wife might have made before Marriage. In many cases it doubtless is, or rather it prevents the Will from having the intended operation. So if a woman should Will away her personal property in Expectation of then marrying, they would revoke the Will: because there is no property for it to operate upon: for by the Marriage, it becomes absolutely the Husbands. Judge Tower conceives that it will revoke the Will, when by operation of Law, the property would have gone to another if it would have gone to the Husband: so that if the Wife had devised away her personal property, the Will would be revoked by the Marriage. But if she should have made her Will in Relation to them many and die before they were married by the Husband, Judge Tower conceives

every

the bill would be good for the law does not vest them in the Husband till they were collected -

Of the Wifes Separate property

Property may be given to the Wife with real and personal to her sole & peculiar use: and in this the Husband has no interest - This property may be given to her either by Devise or Deed and also either before or after Marriage: It may be given to trustees for the sole use of the Wife and the trustees have no interest in it or control over it, for she may dispose of it, as she pleases formerly it was the custom to give this property to trustees but of late it is given directly to the Wife - It has been made a question whether trustees were not necessary to prevent the Husband from taking it by law as they are not necessary for the Husband by conveyance or trustee to this purpose.

1 Ves. 548. 3 Atk. 695. Cumberland 167.

1 Ch. Ca. 37. 2 Ch. Ca. 316. 1 Ch. Cas. 282.

2 P. Wms. 373. Barnett 137. 2 Atk. 393. 2 Vern. 36. 2 P. Wms. 373.

There are no technical words necessary
to create this separate property for the Wife
any words which evince the parties
meaning are sufficient. As this separate
property of the Wife is liable for her Contracts 3 P.C.C. 23
made during Coverture & so is in Equity 3 Ves. Jr. 35
though not in Law. Suppose the Wife ad- 1 Bro. C.C. 16.
vances her own separate property to redeem
her Husbands Mortgaged Lands. Now if
she takes a receipt for the property she
will be considered as the Mortgagee in Equi
ty on the Husbands death, and the Heir
will be obliged to pay her the money before 1 Atk. 269
they can get the Land. & if she lend her 3 P. Wms. 82.
Husband her own property for any sum &
takes a note, bond or receipt for it she
will be considered as a Creditor of the
Husband and can collect them after his
death. Secus if she takes no bond no
note taken for in that case she is supposed
to advance this money for family purposes
An Agreement entered into between the

Husband

2 P. P. C. 341

Husband and wife may contract in relation to property, but it must be paid over to the Husband can be enforced in a Court of Chancery. There is one case which seems not to be founded on the principle by which a Wife holds her separate property, and places it out at interest in the name of her Husband and the Husband receives the interest. This has been considered as a present to the Husband, and consequently his heirs to pay it. It is not settled whether a wife can convey her separate real property without joining with her trustee in the property in the trustee's hands. The Court may compel her to do so. She may convey of her separate personal property without joining with her trustee. If the contract debts her separate property, may be liable for them. She may in some cases sue by proper form of suit. A case of separate estate and the Husband refuses to

3 Ves 452

Ch. Ca. 35

neglect to pay it or she may sue him in Equity in her own name.

If Settlements made by Husband on their Marriage before Marriage

It is a general rule that Minors may receive their Contracts: this case of Settlement however is binding in Chancery and this Settlement may be considered as incident to the Marriage Contract which the Minority enables them to make. 3 Atk. 369

It is to be remarked that they are not at once binding for a Court of Chancery will enquire into it and if the Husband has made an improvident settlement they will not bind him. If to a Jointure made by a Minor this is also good unless it evidently appears he has made an improvident one.

If Marriage Settlements made upon Minors at the time of Marriage

It is settled that no man can make a voluntary Settlement to another

man

Baron and Feme

man which will be good against Creditors: it is void as against them and it is immaterial whether they are prior or subsequent ones: The rule ensuing is whether the Grantor was indebted at the time of making the settlement: not matter whether is any fraud or not in the Conveyance: But their Marriage Settlements go on very different grounds: for there is a valuable consideration given and it will be good against Creditors: However this Settlement must not be extravagant or unreasonable. It also limited in its duration for the Husband can settle it only on his Wife and her issue: he can not limit it to his Wife and then to his collateral relations for after the life is dead the Creditors may take it.

Cro. Eliz. 374 Pop's Case 2 Co. 58. 3 Rolles Abr. 345.

Of Marriage Settlements made after Marriage.

It is a general rule that a Settlement made after Marriage is not good against Creditors:

Amb. 81. 2 Ves. 18.

Power ... Estate

... a power of ... under ... disposition of ... Agreement ... and ... by the ... Deed ... and ... Marriage ... and ... power ... the ... to ... a ... settled ... Property ... one ... relative ... his ... was a sufficient settlement to ... and ... it is good where ... is ... ity of the Wife in the Law of Bankrupt ... which ... trustee ... to ... ... unless ... is a settlement on the Wife:

Dabb. 2 Ed. Amb. 714

Marriage Settlements, made after Marriage are Voluntary grants and not good except in the three last ... mentioned — If a Settlement of Real Property is made on Articles to live ... ately the Wife can only have the use of it but if it is given to her Sole and ... to ... her property absolutely.

Cas. Ca. 22. Comb. 276. 2 Bro. 140

Bl. Rep. 55. 3 Ves. Jr. 454

If Settlements made on Trusts to live Separately

Suppose notwithstanding they the Wife ... a ... Still the Husband

Duer is liable to maintain her — The Husband takes a Mortgage to himself and his Wife: Now what becomes of the interest when the Husband is dead? Or the principle of jus accrescendi it survives to the Wife:

2 Ves. 183 Her right however must yield to creditors: Would it survive to the Wife when third in jus accrescendi? Judge Reeve thinks it would, for it is a voluntary grant to the Wife — If a Married woman join with her Husband in mortgaging her own Estate it is a valid mortgage and she is a trustee of the Husband — Suppose the Husband and Wife should covenant to convey her land: would the Wife be bound by the Covenant? It seems she would not — nothing short of a Conveyance will bind her: There are however different opinions on this subject — At Common Law it has been declared that such a Covenant is binding on the Wife —

1 Ld. Ra. 339 2 Bacon Ab.

If a Wife mortgages her own Lands, &

13 Johns

&c —

accumulate her Husband on his death
she shall have recourse to his personal
Estate for the purpose of redeeming and
her claim will be preferred to the claim
of a Creditor after his creditor. 3 Lecture
If it can be proved by parol testimony
that the Wife never acquiesced in a sale
of the land for the purpose of defeating her Husband
his wife prevent her from taking his
personal property to redeem. The sale
would be the same if she should mort-
gage her own land to redeem her Hus-
band.

Of the Settlement of the Wife
The Wife by the Marriage gains the
Husband's place of Settlement. If the
Husband has no place of Settlement the
Wife gains none by Marriage and if she
married an Alien she must be consid-
ered at the time of her Marriage as
Married to the absence of the Husband
and the Wife becomes chargeable, she

Com. Dig. 4 Fem 41
2 P.W. 347
2 Inst. 390
2 P.W. 264
3 Burr. 1701
2 Salk. 384
2 Com. 689
2 Ves. 87
2 Ld. Ray. 1412
Burn Just. 3rd ed. 89
1 Str. 529
1 Ld. Ray. 444
Burn Just. 3rd ed. 370

Carow and Ferre

Tilley 250 may be removed to the place of her maiden settlement. In this removal it is sufficient to prove her maiden settlement. It has been a disputed question whether if the Husband has no settlement and should run away from his Wife she could be sent to her maiden Settlement. Judge Dewey concurs this may:

A Marriage before the Statute 26. George II. celebrated by a person, not qualified to marry, was a sufficient one to gain a settlement. Judge Dewey thinks the Law as it stood before that Statute & the Law in Connecticut: and a long 8 Mass. 321 cohabitation together a man and wife is proof that they were married. In Connecticut Judge Dewey thinks, a Wife may gain a settlement by living in a place one year with her Husband.

The Relation of Husband & Wife. It is a general rule that the Husband & Wife

Wife cannot be witness either for or against each other. This exclusion of testimony acts to no other relating the influence which near relations may be supposed to have on their minds, may affect their credit but can not render them incompetent to testify. The reason why Husband and Wife are not permitted to testify for and against each other is not on account of their connexion or their interest but to avoid the disagreeable consequences which might result from it in the interruption of domestic harmony. Hence if the parties agree to admit this the Court will refuse. The confession of a party himself is more convincing than other testimony and there is no objection to the admission of it. There are some exceptions to this rule. In England a Husband or Wife is allowed to testify against the other party in the only instance. This case is so important that they

4 Term 5.
2 Strange 5.

Cowper 2.

they may private must give way to public good - The Law will [illegible] Blackburn (Criminal Law) commonly that when the Husband is prosecuted for a battery or other injury done to the wife she cannot be a Witness while at the same time Judge Foster says all the Authorities do not warrant the Exception In the famous case of Lord Audley the Wife was permitted to testify and the Judge says he has seen no case contrary to this decision

Hutt 55 Str. 633 Ld. Raym. 1083. Stra. Foster 1 Hale 301 Lady Audley's case

Of the rights of Defence between the Husband and Wife —

The Husband may justify a battery or wounding committed in defence of his wife and the privileges of the Wife protecting the Husband and the same The Husband has a right to do the same in defence of his wife that she might herself do and vice versa - Thus where a man found another attempting to commit a rape on his wife and in the

Hastily

Baron and Feme

killed him he was excused: the Wife might have done it herself had she been probed the power = Where a man found another in the act of adultery with his Wife and instantly killed him, this was Manslaughter notwithstanding the provocation & the Wife could not have killed him even in the Adultery = These cases sufficiently explain the principle upon which all similar cases are found = The Wife may swear the peace and to find sureties for his good behaviour and so vice versa = In this case the Wife is a Witness & swears that she is afraid of her life, or some great bodily harm and the Husband is admitted to swear the same as to his own and the principle already laid down that a Husband may make a good devise to his Wife: But it was a long time, made a question whether a Husband may make a good donatio causa mortis to his Wife and

Bacon's Ab. Title Baron & Feme

3 P. W. 304

Ante 182

Baron and Feme

or otherwise that he may

Of the Celebration of Marriage

Our law regulates Permanently requires that the Contract between the Parties should be registered regularly celebrated. Until there has been a celebration there is no Husband in point of law possessed of any Marital rights has a Wife entitled to any privileges of a Wife.

A gains no right to the person or property of B, neither would B on the death of A be entitled to Dower or any other advantage in A's Estate.

Previous to the reformation the business of celebrating Marriage had fallen into the Hands of the Clergy under the idea that Marriage was a Sacrament the Management of which exclusively belonged to the Ecclesiastics: at the Reformation the Doctrine that Marriage was a Sacrament was confirmed as it well founded. However the Clergy

...to make an affirmation or oath in the celebration of Marriage = By which they could not do it by virtue of the Canonical character as they professed the Popish R. But being introduced in their practice and sanctioned by Common usage it was considered by the Common Law of the Land that a Marriage could be duly celebrated only by those who were in sacris ordinibus
Thus it continued until the establishment of the Commonwealth in England, when an act of Parliament declared that Marriages should be by a Justice of the peace = At the restoration of Kingly Government under the reign of Charles 2. the Clergy were restored to their office of celebrating Marriages; and by the Statute 13. Car. 2. it was enacted that all persons whose Marriages were contrary to those requisitions are void to all intents and pur-

poses &c

Con. Stat. Con.t

By the Statute regulating Marriage in Connecticut no person can be joined in Marriage unless their intention of marriage shall have been published in some meeting House on the Sabbath &c.

Members of Congress

Settled Ministers and Justices can marry: the former in his Parish or County and so of the latter: and Councillors and Judges of the Supreme Court can marry any where in the State: if the parties are minors, the consent of the Parents or Guardians is necessary.

If any one should marry contrary to the directions laid down in the Statute, he forfeits 7/8: one half to the State and the other to the person prosecuting.

The Statute expressly prohibits all other persons from celebrating Marriage.

A question may arise, viz. If a Marriage is celebrated by a person not qualified according to the Statute, is it void?

void, and are the issue bastards? the person so celebrating is punishable. A Minister has no more right to celebrate out of his own County than a

All marriages in England are void when not celebrated according to the 26th Geo. 2d. providing the common Law Marriages celebrated by persons not qualified, are void. Until the civil wars during the reign of Charles I nothing can be found on the Subject for persons to that time no person could marry unless one in orders. After this period & before the Statute 26 Geo. 2d. several cases may be found which will give light on this point. Vid. 64

After the restoration the power of celebrating Marriages was committed exclusively to the Church of England and yet we find the Court of Kings Bench issuing a prohibition to the Spiritual Court because the validity of a Marriage

Cada

5 Lev. 346. had in the face of a seperate Congregation was questioned in said Court. It was held that a Marriage by a forcaster in a seperate Congregation who was a pretended Minister was reputed as valid: for in the death of the Husband the Wife and Children would be intitled to their distributive Share of his property which they could not have had provided this Marriage had been a mere nullity: The Children would have been Bastards: Such a Husband and Wife may sue for a Debt due to her before Marriage: but had this been a mere nullity the Law would not have allowed that the pretended Husband should join in an action with the pretended Wife: a Marriage by a Popish priest was held valid: The case was this: a Man had been married by a Popish priest who by Law has no power to marry and the person so married

1 Salk. 119. Salk. 121.

2 Salk. 547. Comb. 493.

during the life of the wife married again
The matter was brought before the Ecc
Provincial Court and the second Mar-
riage was annulled upon the ground
that the first was valid - After the
Marriage was annulled the man was
prosecuted in the Common Law Court of
Criminal jurisdiction, and convicted of
Bigamy - This seems to Judge Root in-
consistent for that the Common Law
does not consider an invalid Marriage
void - Judge Root says he knows nothing
in the Statute in Connecticut similar
to the declaration in that of 25 Geo 2d
that a Marriage irregularly celebrated
shall be void to all intents and purpo-
ses: and although it is strenuously in-
sisted by some, that if a Marriage is had
in any other way than that prescribed
by the Statute it is void yet the Judge
says he never heard it urged that if a
Marriage took place in any other way

6 Mod. Rep. 155
2 Stra. 934

(over)

Baron and Feme

ces without publishment or consent of parents such Marriage would be void. The Statute expressly forbids a Clergyman or Magistrate to celebrate a Marriage unless these requisites are complied with. If the prohibition in the one case renders the Marriage void why not in the other? The Clergyman or Magistrate is forbidden to marry where there is no publishment or consent of Parents or Guardians

Baron Feme ne dimus Cogy it has been said that in one case there is a penalty affixed, and in the other there is none: but in Cogy he does not perceive the force of the reasoning. Surely punishment can never validate the offence committed unless we suppose that the object of the Statute was to give the Clergyman the alternative either to marry with publishment

ment

or to pay the penalty: But this was not the design of the Statute: The manifest end of the Statute was to prevent the offence and in case it was committed to punish it: But suppose the punishment of the offence would legalize the Marriage celebrated without publishment or consent: the inference Judge Reeve apprehends would be that a Marriage celebrated by a person not qualified would be valid: for though there is no penalty affixed by the Statute to the offence of celebrating Marriages by persons not qualified yet disobedience of a Statute is a misdemeanor at Common Law and punishable by fine.

Of the Age at which Marriages may be Celebrated:

The age when persons are able to contract in Marriage is in Males fourteen in females twelve years. Infants may contract and marry at any age but the validity

of the Marriage depend on the agreement or disagreement of the parties when they arrive at the age which qualifies them to marry. If the Male is 14 years of age and the female eleven years the Male as well as the female has the power to disagree to the Marriage until the female shall have arrived to the age of twelve years, and so it continues.

6 Co. 22
Roll. Abr. 360
1 Mod. 58
1 Co. Litt. 79

A Wife cannot be endowed till she is nine years old and the presumption now is that nine years elapse before that time. If a wife whose Husband is under fourteen years of age has a Child it is a bastard. Judge Reeve says he has never heard of any such pretended Marriage in the State of Connecticut - he says he has known some where the parties had not arrived at the years of discretion and he thinks it very probable that such Marriages would never receive the sanction of our Courts he thinks it would be void as against

Roll. Abr. 359

divine

Void Policy and Contra bonos mores
Concerning Unlawful Marriages
Divorce and Alimony

4th Lecture

From the Statute 32 Henry 8 ive are to learn who may intermarry = That Statute declares that no prohibition Canonical or Papistical shall unbreach any Marriage = This amounts to a Declaration that a Marriage between parties so nearly related as to be within the degrees of Kindred prohibited by the Levitical Law is void = All Marriages forbidden by the Law of Eng are void but the Statute does not mention what Marriages are by that Law prohibited so that we must resort to the adjudicating of Courts to know what the Construction of the Statute respecting Marriages forbidden by the Law of Eng have been =

1st When there has been a formal Contract to marry and one of the parties refusing to perform marries another Before the

party

party to the prior Contract is still living: to say from determined that such a Marriage is invalid and so vice versa with respect to the Wife: The Law and the Gospel

2d What is man Married a Wife having been married to a former one who is still alive and the Marriage remaining valid: such Second Marriage is void

3d Inhability makes a Marriage void: In case of a Marriage where there is a former one subsisting the second Marriage is considered as absolutely null and void: and in fact there is no Marriage between the parties: they are not Husband and Wife in fact and need no divorce to dissolve the connexion.

But in case of a prior Contract or inhability the parties are considered as Husband and Wife until they are divorced from each other and that during the Marriage and ab initio.

& to relationship according to the Civil degree, it may be
from a great variety of persons, that all
Marriages by persons related in the
ascending or descending line are void.
The prohibition concerning collateral Relations, does not extend beyond
the third degree computing by the rule
of the Civil Law: consequently a Man
can not marry his Niece: tho an
Aunt her nephew: but first Cousins
may marry being related only in the
fourth degree. In computing the degrees
you must begin to count thus: from
John Stile to his father is one degree
from the father to Samuel Stile the bro-
ther of John is two from Samuel to his
daughter Pole is three. Here you must
see if John Stile can not marry Pole.
You must always count to the Com-
mon Ancestor of both, and from them
down to the one: and if she is not within
in

Cont. 2. 97

the third degree you may marry her.
Relationship by affinity is considered within the Levitical prohibition as much as that by consanguinity: The Husband is related to all the blood relations of the Wife and the Wife to all the blood relations of the Husband: But the blood relations of the Husband are not related to the blood relations of the Wife: Hence John and Samuel Stile may marry Peter and Susan Feme: But if John Stile should marry Pol Crump & Sally Stile his sister should marry Thomas Doley and John and Sally should die Thomas and Pol might intermarry: & in other words though a man may not marry his wife's Sister yet he may marry his wife's brother's wife = Judge Cranch observes that precedent is now considered as rendering a Marriage void: The imbecility which renders a Marriage void is such as existed previous to Marriage

(Marriage must not Bleach ay may
have been occasioned afterwards by ac-
cident or infirmity. The parties in all
cases of illegal Marriage may receive a
divorce "a vinculo matrimonii" in
the Spiritual Court and in such a
case the Marriage is declared void ab
initio and the Issue are Bastards.
It should have been before observed, that
it has been determined that Marriage
with an illegitimate relation within
the prohibited Degrees is void. This Deter-
mination seems to Judge Blackstone to be
repugnant to the principles of the Com-
mon Law: which does not recognize
a relation of an illegitimate person ex-
cept the Lineal Descendants of the ille-
gitimate. Divorces a vinculo Matri-
monii" are granted in England only for
causes which existed
at the
Act of Parliament. The Spiritual Court
has power to grant Divorces a mensa et

Therè

1 Bl. Com. 440
1 Com. Dig. 594
5 Co. 98

Bart. 27.

Hut. 235
1 Salk. 121

Baron and Feme

for Separation causes: This Court to
separate Husband and Wife but does not
dissolve the Marriage, because after such
divorce neither of the parties can marry
whilst the other is living nor can it de-
prive the Husband of his Marital rights
or in respect his Wifes property - She is en-
titled to the usufruct of her Real Estate
& if a Legacy is bequeathed to her it is his
But where in such a case he has at
tempted to dispose of a term for years in
right of his Wife the Court of Equity has
prevented him by an injunction -

The causes for which Divorce a mensa et thoro were and are still granted are Adultery Cruelty and well grounded fear of bodily hurt - In all cases of Divorce a Mensa et thoro the issue are not bastardized, and the Matrimonial Court is vested with power to compel the Husband to al-
low the Wife a maintenance called Alimony: and to secure this for

Bro. Ch. Ca. 165. 1 Ves. Jr. 235. 2 Ves. Jr. 93. 3 Atk. 486.

Bro. Ch. Ca. 165. Co. Ch. L. 63.

1 Bro. P. C. 55. 1 Ves. Jr. 64. 4 Co. 44

can

can maintain a suit against new
Parties are some time divorced a vinculo
matrimonii" for supervenient cause
Mod.v 4 52.
by Special act of Parliament.

The Law concerning Divorce in Con-
necticut is a very different system from
the English. The Supreme Court is vested
with Authority to divorce for four causes:
viz. Fraudulent Contract Adultery
Wilful absence for three years with total
neglect of Conjugal Duties and seven
years absence unheard of. In the last
case it has been holden, that a divorce is
not necessary to entitle the party to mar-
ry again the absent party in such a
case being considered as dead.

A singular case once occurred in this
State: A man had been absent seven
years unheard of and his Wife married:
he afterwards returned and applied to
the Legislature for his Wife. Soci
They permitted the
new way. to Wife

able to choose and who chose the former
husband = The Construction of the
term Fraudulent Contract has by a late
decision of the Court of Errors which is now
absolutely been confined to the single
case of Imbecility (i.e. of
imbecility which is not mentioned in our
Statute as a cause of Divorce =
The practise of the Superior Court of
Conn. before this decision was very differ-
ent from that: true indeed they granted
Divorces for imbecility as the ground of
fraud: but they also granted Divorces
where the fraud was such as to vitiate any
other Contract = If nothing more were
meant by the term Fraudulent Con-
tract than Imbecility it is certainly a
very awkward expression to convey such
a plain idea as Imbecility = If the Legis-
lature meant the same by "fraudulent
contract" as the term ordinarily imports
Judge Kent thinks the provisions of the Statute
are not unreasonable

16th Lecture

It seems hardly consistant with Justice that Contracts which subsist between all ranks should be void in toto and as void whilst the most important of all Engagements should be deemed inviolable when obtained by cheat and imposition. Where a man by fraud gets his neighbours property into his possession the Contract is not only void, but in many instances the transaction is felony. And can not the Common sense of mankind revolt at the idea that where a man by the same abominable fraud obtains the person and property of an amiable woman the Law should protect and give the same efficacy to the Contract as if nothing unfair had happened! The truth is that a Contract which is obtained by fraud is in point of Law no Contract. The fraud puts out of existance whatever outward Contract there might have been. A Marriage procured without

Contract

Contract can never be deemed valid
There is no more reason for considering a Marriage procured by fraud, than one procured by force and violence. The consent is totally wanting in the former as much as in the latter in the view of the Law. The true point of light in which the Capitol is to be viewed, as Judge Moore acknowledged is that the Marriage may exist in fact. But while it is necessary to have a Divorce since the Marriage has been celebrated that all may be enjoined, who are concerned, that such Marriage may no effect and tie upon them forcible the Chancery Court, Contract certainly obtained and All the Appearance that is created in the minds of the creditors view of the illegality of separating Husband and Wife, is removed if the view of the Subject is correct: for they were Husband and Wife consent an essential requisite & ingredient to the

Contract

Contract being made. The case of
Adultery which furnishes cause for a
Divorce, is the Adultery known to the
Common Law as understood by the Ec-
clesiastical Courts in England and is where a
Married person has illicit connexion
with any other person, whether married
or not. This is different from another kind
of Adultery punishable by our Statute
viz Whipping, burning in the forehead
with the letter A. and wearing a Halter
about their neck, over all third Instance
whilst they continue in the State.
This has sometimes been called "Commo-
-n Law Adultery" and can be committed
by or with a Married woman only.
When a Divorce takes place for this
cause, and the Wife is the innocent party
She is on the death of her Husband entitled
to Dower. With respect to three years wilful
absence, it was held determined that if a
Husband turns his Wife out of doors, and abs-

her so that she can not be legally sued and the deputy sheriff, being in a civil, and alienage on the part of the husband.

In all cases in which the plaintiff must obtain divorce, the divorce is "a vinculo matrimonii" and in no case is the offending husband divested the children belong to the husband but they can not be taken from the wife until they are of tender years of age. The Court when the divorce on account of the husband's fault, has a right to assign to the wife as her estate alimony and power a part of the husband's real estate not exceeding one third whether real or personal. When personal property is assigned the making out a schedule of the property specially and decreeing that it shall belong to the wife, this decree vests the property indefeasibly in the wife. If the estate of the husband consists in money so that there can be no specific assignment the Court will

ascertain

ascertain the amount of the Husbands property in the last mentioned way and third secondly that the Husband pay the Wife such a sum and on failure pay him under a penalty which is recoverable in the Common Law Court, without any liability to be expended in a Court of Chancery = If sufficient personal property is not to be found and the Husband has Real Estate the Court will assign some particular piece or pieces of land to her by metes and bounds and such an Assignment vests a fee simple of such lands in the Wife

It is to be remarked, that the Wife, right to Dower on the death of the Husband from whom she is divorced is not affected by this Assignment of property to her at the time of the divorce

This Assignment of property to her is made for the support during the life of the Husband Dower is where the given

her

by Statute. All marriages within the Levitical degrees are prohibited by our Statute and pronounced absolutely void: and the issue are illegitimate without the intervention of any Divorce of the Parents. — A Divorce in such a case is never had, the Statute having by express terms rendered it impossible that persons pleading in such relation should contract a Marriage, or having carnal knowledge of each other, subject to severe punishment.

In Connecticut a man may marry his wife's brother's daughter or his wife's Sister's daughter (i.e. his niece by affinity). Application may be made to the Legislature for a Divorce, and they will frequently grant it for Cruelty and a mere groundless fear of bodily harm &c. The Legislature divorce à vinculo matrimonii on a Libel and then appoint a judge who shall enquire: they also

then seem it proper to pass over the Wife Alimony"

6 Lecture

1. After enacting the Statute of Distributions, a question arose whether the Husband must distribute to the next of Kin as other Administrators or not? To settle this question 29 Charles 2d was enacted = 2d An annuity is granted to a feme sole, she marries & during the Coverture Arrears accrue due to her: the Arrears belong to her Husband as such, and not as Administrator to her: Qy to Arrears before Coverture he is entitled to them only as Administrator to the Deceased Wife. but by Stat 29 Car. 2. such Arrears and given absolutely to Him 3d In a case in the 2d Vern. a question is made whether

2 Mod. 20.

Vern 3 4 Eccl. St.

them

the Estate of an Husband is entitled to the Wife's Estate on the death of the Husband who has settled on the Wife a competent Jointure = It was determined that the Land go to the Wife: and the distinction Judge Wilson puts is this: when an Estate is settled as a Jointure, it has Power to never operate as a purchase of the Estate by the Wife by the Husband: But even a Jointure equitable settlement not a Jointure eo nomine will not bar the Wife of Dower but will operate as a Jointure of the above =

1. A Wife seized of a term for years 1 Rawle 334 marries and aliens her Husband obtains no right to dispose of their land:

2. The Husband has the same power over an Estate in trust for the benefit of the Wife which can be exercised for his separate use as Estate directly granted to him and the profits arising from them only the term

1 Rawle 334. 88: 84

land is settled as a jointure, or for
maintenance of the Wife after the
Husband's death. There is a case
cited & found also reported by Lawrence
Keb. Chancery to Trustees for money and Mortgages
and secured the rents part of
the money should out and lost Bonds
and other security then vicar the
question was, whether the Husband
must hold this Estate as Executor
as he did the above, or in his own right
as Husband? and it was adjudged that
he held such terms and this annuity
as Husband, and pass not in entering
the same. This case is cited in Ob-
hart &c. There are cases in which a
different opinion is taken

Single Examined cases go to Lunacy State
as Husband Case for ascertained
Annuity of way of a bond for years
belonging to his Wife to commence on
Sundials on his death is valid

Vent. 3rd 8. 82

Ch. Ca. 45. 13 Freem. 186 Freem. 318

Ch. Ca. 118. 113 Sumtez Vent. 353 Freem. 318

Ch. Ca. 95. Chan. 4

Baron and Feme

4th Feme sole for twenty years and marries the Husband leases the same for two years and dies before the expiration of the two years the Executors of the Husband has the rent of the residue of the two years and the Wife for the residue of the time

Mich. 39.

1. In Brooke Chancery 205. there is a authority which proves that an action and promise to a Wife to pay her so much for her service, can be maintained in her own name as well as her Husbands.

2d The Husband may in an action for a battery or Tresspass in the same Declaration demand damages for a battery on his Wife, per quod consortium amisit

1. In case a Wife is given for a tresspass viet et armis, such fine

Mich. 6. shall not be levied on the Husband.

2d The Debts of the Wife contracted

while

while sole, and discharged by Bankruptcy of the Husband and in case of his Death, will not survive against Lord 3. In Hamilton 114: there is a case where a Man married a Feme who had a large personal Estate, she died and left a Grandchild, a Infant in which it was resolved, that the next must maintain this Grandchild: this case is not analogous to the general Law, that the Husband is not bound to fulfill the duties of the Wife after Coverture is at an end

4th In an action of Trespass against the Husband and Wife if the Husband is acquitted, and the Wife found guilty, Judgment and Capiatur is good:

1. If a Woman elope with an Adulterer and thereby forfeit her Dower yet if she is received again she shall have Dower and the Husband is liable for her trespass

1 Roll. Rep. 24. 3 Bulst. 3

Hales & White Cro. Jac. 103

Bland 17.

1.st Settlement of property upon a wife by Articles of Separation, does not affect the rights of Purchasers or Creditors unless there is a Covenant on the part of some friend of the Wife's or her Trustee to indemnify the Husband

County of Chancery have often directed a Separate maintenance and it seemed until lately to be understood by all Lawyers and Judges upon the Law, that in all cases of separation where the Separation rested on an Agreement that County of Chancery had the power of directing a Separate Maintenance:

Lord Eldon declining however has rendered this Doctrine questionable: Where Separate Property has been promised for the Wife by Articles Speaking to Marriage, if such Wife elope from her Husband and cohabiting in a State of Adultery yet

Agreed

upon a bill in Chancery by the wife
for a specific performance it will be
decreed against the Husband
3. A. Husband after an agreement
between him and his wife to live sepe
rately can not compel her to cohabit
with him. The Court held such a Con
tract to be binding on both until dis 8 Mod. 22.
solved by the agreement of both
4. A. Deed by a Husband in which
he agreed to allow his Wife a separate
maintenance was confirmed by a decree
of the Court — 5. A Husband gave a
bond before marriage to leave his intend
ed Wife a certain sum if she survived
him: it was decided in Chancery to be Finch R.
paid before other Debts 282.
6. The profits made by a Wife of her sepa
rate Estate and at her own disposal 2 Ch. Ca. 35
of Property settled to a feme to any use
soever to be her separate property the
intention of the testator being fairly con-
strued

by taking the whole Land together as tho' it was so where in the Will declared to be his intention

1st. A Feme Covert who with her Husband levies a fine of her Land with Warranty is liable on the Covenants of Warranty - The Deed of a Feme Covert to a fine is an exclusive after her a fine would be

2 Bac Ab. 2. The agreement of a Wife to levy a fine of the Land was by Chancery decreed against her after the death of her Husband

2 Vern 253 & 295

3d. A Lease to Husband and Wife the Husband commits Waste and dies the Wife continues to occupy the Land: She will be liable for the Waste committed by the Husband. Secus if she was not continued in Possession

4th. In the case of Contracts where the Husband is permitted to join the Wife when he might have sued and sue of Effects belonging to the Wife:

It seems to be clear in Cartland 231, pg that the Law will not enable a promise to the wife although her services are the meritorious cause of the right of action and in such a case the Husband must sue alone. In an implied contract for work done by the wife the Husband can not join the wife — 2 — In a case in 2 Vent 195. the Judges differ respecting the question whether the wife could be joined in an action for slander against the wife. Cartland 2 Lord Raym 938. Bright 1 Lord Raym 562. Cro Eliz 541. Cro Jac 90. Yelv 67. Hob 56. Cro Jac 90. Yelv 67. Hob 56. Cro Jac 90. Yelv 67. Hob 56

must be necessary to join the Wife because such cause of action would not pass to her: but her property being the consideration of the action the Husband may bring it alone at his election to join her or not.

3d. Where a promise was made to a feme Covert in consideration that she would marry and such a promise to pay her £5 - here if the Baron die such cause of action survives to the Wife - This is reasonable to some extent for here a Legacy was given to the Wife during Coverture and not collected and the Husband has the right to receive during life of the Wife - It is difficult to discover the principles on which such decisions are founded for there can be no question but that the Husband may sue without his Wife and recover all the debts of the Wife which accrued during Coverture, and in the same manner Should the Husband be unlawfully ejected from his farm

of the Wife. It is true that by the Custom of the Court where there is an action pray process to the Wife the Husband may join the Wife but in such a case by fine because the Wife has the smallest Cr. fee 7s
degree of interest therein
4th In Croke Charles 399. there is a case of an Estate in reversion granted to Baron and Feme and to the Heirs of the Baron in fee: the Baron brought an action in his own name against the tenant to recover damages for not repairing the House according to the Covenants in the lease: it was objected, that the suit ought to have been in the names of both Baron and Feme, as both had an Estate therein but the Court held that it may well be brought the words of the Court are "The action being personal for Damages only it might be brought in his own name alone" the judgment that the action is well brought &c. cannot but adjudge

Baron and Feme

the reason given, the wife is no estate is given to the wife; it is not an estate for life in the Husband and wife; estate is under one in fee to the Heir of the Baron and according to the rule Shelley's case where an Estate is given to A. for life and the terms "his Heirs" are used it is a per limitation to A. the words "Heirs" being a description of the quantity of Estate given: of course in this case the Husband took the whole Estate in as soon as the Wife took nothing, so that the Deed could not have been brought in her name together with his -

1. That the Wife of a feme Covert so far as it respects things in "autre droit" and that her Husband may be made Tenant to the Praecipe 2 Co. 4 Henry 1

2. A feme Covert may devise her lands to her Husband where it is the custom of the Manor - 1 Rep. 123. There is another case in Brooke Series Page 18. that a feme Co

vert

might devise her land, which by com-
mon Law they could not, but could not
devise them to her Husband because the
devise being in his favour it would be
presumed to be done by his coercion: but
there was no objection on the ground of in-
capacity resulting from Coverture
3d. There is a case in Dublin 637. page
where the Husband had covenanted that
his Wife should have power to devise her
real property and she did so devise:
but it was held that such devise was
void for by the 29th. Henry 8. she was
rendered incapable of devising Real
property: and that the Husband could
not remove the disability created by the
Statute. Many Authorities were pro-
duced to shew that the Husband's agree-
ment had rendered the Will of Mrs.
valid. The Court observed that all
the case used of Wills of Personal Proper-
ty and said there could be no doubt
but

York
3 Edw 3
6 Edw 3

Baron and Feme

but last. Husband could not by his
power to wife personal but not real for
they became the Statute forbid it. It
must be remembered that the Common
Law never creates any disability in a
Wife to receive any more than in any
other person for at last the permissions
of the Husband could not remove the dis-
ability in the Common Law and none
are in the Statute

1. A Husband procures a Life Estate of
the wife with his lands, and let him have
the money, he will transfer to that re-
mainder. Now such an Executory fee
seems is not binding when the Husband
got it the Husband should give a bond
to a third person in trust for his wife it
is not fraudulent against Creditors.

Dec. 48.

2. A Gift to a wife or a Donatio mor-
tis causa good.

10 H. 4 41.

3. An agreement by the Husband
and Wife previous to Marriage is not re-

2 Ch. Ca.

tinguished

extinguished by the Marriage
2 Vern 619 Trin 1702 Bibby Pratt & Fane
and Hamilton & it was holden by the
Court that Marriage was a release
pro tanto of a debt & that for so much
but the Wife - 2 Vern 2 Salkeld was
by a woman before Marriage of her
Land to her private use without the
knowledge of her Husband, could not bind
him - 1 Str 636 & a Motion by him for
Alimony a bastard - 2 Str 1056 was not
to be a Motion either for or against her
Husband although all parties consent
2 Str 1094 though it has been frequently said
by the Judges that the Determination
in Lord Lindsey's case that the Wife was
a good Witness on an information ex-
hibited by the Husband for personal abuse
done to her was not Law yet Judge Price
says he has not been able to find a
single Precedent in point against that
Case for in the case where they have

Vern 2
Salk 691

Lord

Com. said there were not cases of Separate Estate to the Wife - The Doctrine in Lord Redesdale case has been confirmed by the case of Tea & Tea in Strange tried in Lady Parnell case, her affidavit was read to lay a foundation for an information against her Husband for personal violence by him to her.

Mr Wentworth's Office of Secretary 2d page shewing that when the Wife has Estate due to her she can not by marriage and Receivership deprive her Husband of the benefit that might accrue to him by being Accountable for it but that it is Assignee of good which she had as Executrix, for now he might could be rendered to him in that case as they are to the most of him of the Wife's Estates. it appears to Judge Parnell that the Construction of this Doctrine as laid down in the first clause is questionable for the Husband's right accrued by Marriage is no more than the right of a Receivership

remainder regulate after the Debts are
paid. If there is no Wife it certainly is
not a Barrister right at Common Law
1. Whether a Marriage per verba de presenti
which was obtained by Duress of
the person is void has been the subject of
very discordant decisions

vide Vin Ab. 35 and Anon 3 Atk 750

It is difficult to conceive how a Wife's
Contract can be held to be more unpenetrable
than a Bond, which can be valid
when obtained by Duress, and unknown at
the same time all other Contracts obtained
by Duress and void. The Authority also
holds "that Marriage by an Idiot is void"
and upon no principle "that an
Idiot can consent to Marriage": If
his consent to his Contract binds him,
a Wife is not bound by all her Contracts
why is he bound by this?

When a Divorce is given to a divorced
Wife it does not affect the Creditor, but the
Husband is personally liable

Forms and Terms

3 Arbus tunc [illegible] a woman for the cause of "adultery" it is only a Divorce de jure only a divorce a mensa et thoro" and neither the rights of the Husband or the Wife as it respects property except only what is acquired by the personal services of the Wife, are affected by it, and the Wife should be entitled to her Dower

Co. Litt 33.

3. In England it has been holden that in case of Divorce a vinculo matrimonii," which proceeds on the ground that there never had been a lawful Marriage; if the Husband was entitled to the Wife before Marriage, after the divorce he is still a Debtor and all the property which he received with his Wife belongs again to her: yet if the property has been conveyed by the Husband bona fide to others the rights of such third persons are not injured

Bishop Mar. & Div. Vol. 2. p. 208.

4. A Wife divorced a mensa et thoro is not entitled to the administration

of her Husband Estate, nor to a Re=
tributory Share thereof.=

Infant and Child

1. Lecture

This title will include that of Guardian and Ward according to the Common Law and our own.

1 Bl. b. 1 c. 3 224. 134 v. 359

A Minor or Infant is a person who is not of male under the age of twenty one years = The age of Minority is fixed at different times in different Countries By the Roman Law it was twenty five We will first examine the privileges and disabilities of Infancy as the Minor Children: 1st As to Crimes

1 Bl. 20 Hale 25 Hawk 1

It is an invariable rule of the Common Law, that no person under the age of seven years can be punished for any Crime. Such a person the Law presumes to be without any Will No person can be punished for a crime unless there is an intention coupled with the Commission of it. There can be no Will in this case, there can be no pun-

ishment

At common law an infant may be pu-
nished for a crime committed any o-
ther person because he is then pre-
sumed to have arrived at an age of d-
iscretion to have a rule of his own
Between the age of seven and fourteen
it is always a question of fact whether
he is capable of committing a crime
The presumption of law is that he is
non capax" but presumptions of
law like any others may be rebutted
The terms probandi" however lie on the
prosecutor" The presumption that persons
of the age of an infant under seven years
of age cannot be rebutted it is an
absolute or praesumptio Juris de Jure"
according to Sir Wm Blackstone this presump-
tion varies before and after the age of ten
years and six months: Between seven
and ten years it is in favour of the in-
fant, after that it is against him: If
any difference does exist it only with re-
gard

burden of proof in the latter case, from
the prosecutor to the infant. But there at
least is a positive distinction in the
English Law. This rule is not carried
so far in the Roman Law. The rule is as laid down
by Ulpian and obtained in Blackstone and
Gaius, that in penal cases infants and
[illegible] are liable to the same punishments
as adults. [illegible] are not
punishable. The Civil Law is likely also to
[illegible] because infants are exempt from
[illegible] which cannot be. It
[illegible] a case in the number of Gaius that
[illegible] should be punished for murder
[illegible] Roman law is standing alone in
[illegible] in the administration of
[illegible] that an infant should not be
[illegible] in his own confession without
[illegible] and cautious examining by the
[illegible] of the people of Athens. The [illegible]
[illegible] and read to his [illegible]
[illegible] three times before the
[illegible]

infant

Lofft 70
Cooper 16

Lord Mansfield observed that the Court of Chancery had put an end to bastardy.

But prayed to Counsel stating application to the Court of Common Pleas, before a Mandamus or Attachment is to be issued.

In some cases they are punishable in the Ecclesiastical Courts although not married and in fact not. It is a little difficult to say in some cases. But the Court of Chancery thinks it the true rule. Of the Offences created by Statute it seems doubtful whether any can be punished at Common Law but many are doubtless although not mentioned in the Statute could be punished at Common Law.

Black Stone 5 Vol. 4 Vol. 2 Burr 2 vol. 733

Out of the Statute of Queen Anne concerning Perjury in Courts of Common Law contrary and against a Statute for which the party is punishable at Common Law. Even Infants are liable within the rule of punishment. The reason given is that the punishment is attributed to the

the Time or it is not conveyed to it at Common Law - This is not sufficient. The true Reason is that the Courts of Law in construing penal Statutes will not allow the Privileges of Infants at Common Law to be restrained by mere implication: There are the Reasons no twisted or pervaded to public Offences

II. We are now to consider how far Infants are liable for their Torts or Civil injuries: Infants are equally liable at any rate Civiliter if they act corporaliter be it force and the Reason is that the Law in redressing an injury does not at all regard the Intent it looks only to the act done and the Consequences. In criminal Law regard the Intention but in private injuries it is not so. The enquiry is not whether he intended it or not but whether he caused it or not. Intention to be sure this intent may be proved or from the Language - There is

Ford v. Gaunt 2 Atkins 477

3 Bin 348 one case in this Court, where an infant
between seven and eight years old was sued for an
assault and battery [illegible]
and it was not understood that the in-
fancy would not be a plea where the distinction
was taken applicable between the case of
public and private crimes: this wholly
subsequent to the ideas of justice, that
a person should be punished when
there is no will. But in the case of
Cro Eliz 199 an Action of Slander, it was held that the
party injured should have a compen-
sation - it has been argued, that an
infant seventeen years old is liable in an
3 Bac Abr 132 action of Slander. And from thence it
is to be inferred, that no under that
age is not liable - this inference is not
logical, and further there is no case
where one under that age has been sued
- [illegible] Parent servitory an In-
fant is liable in an action of Slander
wherever he is capable of committing
and

then he may be compelled to perform to the Infant's benefit. The Infant is not liable in an action for any money advanced or lent to him previous to Contract, unless he be charged by a Contract entered into by a person who is not himself an Infant. Any Contract by which he would be liable as a "Common Cheat" whenever he is [illegible] In one of these cases it was only holden that an Infant is liable only for those torts that are attended with some degree of Guilt: You cannot be sued for her subjected to an action of Slander unless there is an Element of Guilt: All the cases are collected in the 2nd part of the 1st Vol. of Kent on Infants and Lia[illegible] for my friend Lord Mansfield and Lord Eldon. Vide Kent Vol. 2 p. 9

the former says the privilege of Infancy cannot be given up to

Cheat

3 Bac 1810. Parks Rep. 235. Should not be a Bound. The latter says an Infant must be liable in an Action founding in Contract if it be for Goods or Debts by him wrongfully obtained. ~~Action founding in tort must be sustained~~

8 Co. Rep. 1. 335. ~~against an Infant for~~ Where the cause of Action is an Infant cannot be made liable by being sued in tort or contract for the Consideration of the Contract. It was once held by Judge Parker that if an Infant would take upon himself to trade and act as if of age no Infancy should be admitted because they would be to take advantage of his own fraud. This cannot be Law as laid down for if it were an Infant might be bound in his Contracts and thus as such would bind him in all Cases. In some cases Chancery will decree an action to be good against an Infant in order to prevent the consequence of his fraud. This is however

Ld Raym 20.

2 Vern. 38
3 Vern. 586.
1 Fonb. 70. 71
2 Eq. Cas. Abr. 526 489
1 Bro. C. C. 358

a rule of Equity and a Court of Law never would recede it is left to the discretion of the Court. A Court of Chancery never can hold an Infant to his Contracts to prevent the effects of fraud or where it is absolutely void: because that would be to make a bargain for the parties. The last rule applies to those Contracts which are merely voidable. Of the Infant's liability for Contracts and certain other matters. [Fonbl. Eq. 1 Vol. Bk. 1. Ch. 3. § 5.] [2 Lecture (—)]

At Common Law the age for a living Guardian in both cases is "fourteen" before this time they have no right to choose a Guardian. According to the English law an Infant may be an Executor at any age: even an unborn infant may be appointed, and such appointment would be good. But though he be appointed and has all the rights & powers incident to he cannot act as [Infancy & Coverture 3 Dall. 3.] [5 Co. 30 Coke 381 Ray. 338 Vaux 26 307]

Coke

Lovell 53
Bac. 375
" 374
Bac. 235
Co Litt. 174
Bac. 121
Vent. 213
Dyer 102.
Bac. 381
Yelv. 205
Vent. 76.
Co. 39.
" 391

the duties till he is seventeen years of age: Consequently when one is appointed under this age an "administrator during minority" must be appointed (No person can be Administrator untill he attain the age of twenty one years: and the reason given is, that an Administrator must give bond, for the faithful performance of Administration of his office and it suits, being abhorred by Law. An Executor need not by common Law give bond: for he is not appointed by Law but is made so by the appointment of the testator himself = But in Equity it is a question whether a person can be an Executor under the age of twenty one because by the Law of this State the Executor is required to give bond for the faithful Administration or execution of the duties of his office = The age of Consent to Marriage is, Males, fourteen and

1 Roll. Ab. 29
Comb. 495
Carth. 466
1 Ld. Raym. 345
1 Salk. 44
2 Ld. Raym. 1571
Salk. 39
2 Bac. Ab. 381
4 Do. 101
Comyns Dig.
2 Ld. Raym. 1338.

Consent to Marriage

and in females to twelve years: and no Contract to Marriage
person under those ages can be bound
by any of these Contracts = If one is of
age and the other under the age either
may avoid because the agreement
must be mutual. (But according
to the English Law a female may be 1 Bl. C. 465
married at seven years of age: and if 1 Stra. 634
when her Husband dies she is above the 1 Bac. Ab. 76
age of nine she may be endowed out 2 Bl. C. 135
of Estate = The age of disposal of per-
sonal property in England is said to be When capable of disposing of personal property
by some Courts in Years and twelve
in females = By statute 15 16. 17 18.
The latter portion seems to be that which 2 Vern. 17
gives the age at twelve and fourteen. 1 Mod. 89
If of this age and sufficient discre- 2 Mod. 318
tion they may make a valid disposi- 2 Bl. 424 3.6
tion of personal property = Full age as 1 Bl. C. 463
was by law fixed at twenty one years 2 Do 297
but is completed on the day preceding
the twenty first Anniversary of the Birth

Ward

Parent and Child

1 Bl. Com. 84
act 2. 440
625
2 Inst. 290
144
186
2 Rol. Rep. 480.
1 Jac. 545

births the Law makes no fraction of a day: The day of the birth being included it cannot be again and it makes no difference whether the Infant was born the former or latter part of the day:

Concerning Contracts it is a general rule that no person under the age of twenty one can bind himself by a Contract. Regularly the Contracts of Infants are void and not binding: (they either void or voidable) But if an adult make a Contract with an Infant he is the adult is bound by it whether the Infant is or not: If then an action is brought on this Contract the adult can not plead that an Infant joined with him: The Adult whether he make a Contract with the Infant or join in making a Contract is bound and can not take advantage of the nonage, to avoid the Contract: The Infant alone, receives a sufficient and

5 Bl. Com. 85.

Com. Dig. Infancy. B.
Inst. 380.
Bac. Abr. Infancy. B. 5.
St. Ed. 3. 24.
5 Mod. 214.
1 Salk. 279.
Ld. Raym. 707.

Dismission

to support the Contract. This is a
consideration in Chancery who will
compel a specific performance on
the part of the Adult. Mr Fonblanque
observes that this Court would compel
the Infant to a Equity. This is the gene-
ral rule, tho it is not an universal
one, for if the Contract is absolutely void
it will not hold. The chance of a be-
nefit is always sufficient consideration
to raise a promise. This is the case
in all voidable Contracts, made by an
Infant and an Adult, but a void Con-
tract is strictly void, on one side there
is no consideration to support the en-
gagement on the other. Therefore if an
Infant makes a Contract which is
absolutely void, "a Legal Nonentity" there
being no consideration to support it, the
Adult is not bound. And it seems
well settled that if an Infant after he
has made a Contract receives the
con-

a. Ed. 390
18. w. 26 Com
39. 40
9 Wis 393

Str. p. 937.
Bac. 26 Com
39. 40
2 Wis 393

consideration moving towards him
still and afterwards" saving the Con-
tract being not found to restore the
Consideration which he had received.
The Law views it a gift to him: It has
however been disputed on this case
whether an action of Trover would
not lie where the Consideration was
specific, or an action of "money had &
received" where money is paid. In
the grants of the infant Lands the Books
do not warrant the idea, that an ac-
tion can be substituted. Such proce-
dings might deprive the Infant of his
privilege & enable him now to be a-
ble to change the nature of the Con-
tract & call the consideration from that
which was specific to one of a specific
nature, and thus the Infant to refund
the consideration out of his own Estate
by which means he may always en-
joy the whole of his Estate, the con-

1 Roll 139
2 Bac 140
" 141
2 Ves 167
" 119
1 Eden 215
" 215

joined

pena daily to trade with him. For it is a general rule that Infants cannot be bound by their Contracts yet there is one exception to this rule, Viz. in case of Necessaries. It is a general rule that Infants by the Com. Law may bind themselves for necessaries by Contract. Now necessaries consist in general enumerated as Cro. Jac. 345 Co. Jac. 4, 94 Hob. 105 1 Roll. Rep. 41 1 Bl. R. 166 8 Mod. 278
Cooking: Medicine: Instruction. as in a valuable trade. The reason why an Infant is not bound by his Contracts, is a fear that he will squander away his property: Some time must be given: and this by Law is 21. and till then he must always be expected in the case of Necessaries where a new Cr. Ld. 583 Co. Jac. 514 Palm. 51 Salk. 387
need exists. Now necessaries must be absolutely necessary for him at the time of his contracting: and

what

what things are necessary must be determined by the plaintiff's situation and rank in life. The provision must always be reasonable and in all cases where the plea of infancy is put in the matter of fact is to be left to the Jury whether the articles furnished were necessaries or not. Hence it is that when the Defendant pleads in Infancy the Plaintiff may plead generally that they were furnished as necessaries whereas were it a question of Law the Plaintiff would have to plead specially in his replication what the things were that he furnished.

(1 Roll Rep 528. Cro Eliz 619 Str 1104 2 Ld Ray 1383 2 Str 1183 Comb 118 1 Bac Ab 17 1 Salk 58)

What may bind Infants under this restriction, for their Cloaths & Education necessaries: They have the same power to contract for them (as) from the Wife and Children, and the Husband is bound by their Contracts, tho' an Infant, as if they were made for himself. Consequently

(Parr's Ld Raym 953 Str 1108 Salk 61)

L

he may bind himself for Labour, necessary for their comfort and convenience: An Infant is also bound by the Contracts of his Wife made before marriage: Yet the Wife herself must have been bound — The exception must be understood with certain qualifications for no Infant can bind himself for necessaries, if he is under the care of a Parent or Guardian or Master and duely provided for: Neither is it true that he may bind himself if the Parent, Guardian or Master does not furnish such necessaries as he may think proper:

Parsons note, 93

2 Bl Co 1595
2 Atk 35
Peake Ev 3d 22 2

From what has been said, it follows that an Infant can bind himself only in these three different cases: 1. When he has no Parent Guardian or Master who is bound to provide for him. 2. When he has one but is out of the reach of his care: 3 When he has one and is within his reach but is duely provided for, that

he

he is suffering or in danger of it. In either of these two last cases, the Parent Guardian or Master is liable on the Contract. The Infant is not in absolute bound even for necessaries by his express Contract: because he is not liable to the value of his Contract of course, but only to the amount of the necessaries furnished: In the case of an Adult who makes an agreement to pay a certain sum for goods, he is bound by it, although the article are not worth one half the sum he agreed to give, but in the case of an Infant he would not be so bound: it would seem therefore that he is bound when an Account is a quantum Meruit that supplied by Law

Salat 3rd Ed. 560 Bakh. 151 Ld. R. 585 Bl. 79 & 92

The Infant can not bind himself in any way except that an Adult can when for necessaries. This will appear from the following distinctions which are on the one hand that the Contract

is void

was made for necessaries: 1st An In- Str. 164
fant can not bind himself by a Ca. Temp. 220
Note bond. and this however ancient 1 Peere 34
prior the consideration may be:
2d An Infant may bind himself by a 5 Term 937
Single Bill, given for the proper figni 1 Lev. 86
dated penn, given under hand and Sal 1 Ld. Ray. 182
3d By a negotiable note when actually 4 Burr. 2115
negotiated, and Infant is not bound. 1 Str. 648
4th By a note negotiable or not actu- 1 Wms. 403
ally negotiated he is bound 2 Term Com
34. 35
5th By a Bill of exchange not negotiated Peake 349
he is bound, but where actually negoti- Carth. 160
ated he is not bound: As between the Chitty 8-20
Drawer and payee he is liable 1 Smith, 45
6th By an account stated which is un Holt 36
liquidated and signed by the parties; Latch. 139
the Infant is not liable or in an action Hoy. 85
of Assumpsit contractual formed on 1 Str. 547
an account stated, he is not bound: Wms. 38
The enquiry now is, what are the reason 3 Burr. 1354
of these distinctions. We will take the 1 Peere. 40

easy

cases in their order. / Why an infant may not
an infant be bound by a penal bond.
The reason given in the Books is that
the penalty is not usually to his advan-
tage as it may occasion a forfeiture.
But is not satisfactory, because relief
might always be had against the penal-
ty. The reason is the true Consideration
is not known: it can not be told whe-
ther the bond was given for necessaries
or not. Where a penal bond is executed
the Consideration never can be enqui-
red into: and therefore the Infant would
at all events be obliged to pay the bond
which he has executed without being
permitted to deny that the Considera-
tion of the bond was incompatible with the
privileges of Infants would be wholly de-
stroyed. The reason then which pierces
through all the cases is? If the Contract
is such, that the Consideration is un-
avoidable he is bound. but if the nature

Mo. P. 748
Co. Ent. 172
Bro. 43
Cro. E. 38
Ebury 22

of the Contract excludes all enquiry into the Consideration of it, he is not bound. 2. By a single Bill he may bind himself. It is true, that now a Single Bill is not examinable: but at formerly was: and at the time that the rule was laid down, that he might bind himself by the Statute. Such days do bind no one, where a Single Bill is not examinable unless an Infant is the Obligor. 3. By a Regotiable note negotiated he is not bound because as between the Parent and Maker no equities can be had into the Consideration: If them so, it may found the principle of the Law Merchant would be overthrown as to all negotiable Instruments and void. But altho the note is not negotiable as it is, still bound by it because the consideration may be enquired into while it continues in the hands of the payee: it is a mere single Contract

1 Ath. 382 486. 4 Bac 135 2 Bac 1 7 Bac 1 Bryan 3

2 Rol. 4 Ejec. 55 Burr 667 1 Str 481 Lord Raym 1562 Salk 27 Peake's Ca. 261 215 2 P. W. 262.

on the principles of the Common Law
1st By a Bill of Exchange before negotiated he is bound and after it he is not
Vide Law authority } 2d. stands on the same footing with the
godson's Note. 3d. In an account
Latch 59 stated the infant is not bound although
Vin. Ab. 87 the item may be carried into: but the
Ab. Jac. 519. reason of the rule is, that it was settled
Doct. & St. 35 at the time, when it was not carried
1 Lutw. 93 into: and this is one of those cases says
17 Rob. 42 Lord Mansfield, where the rule continues after the reason has ceased.
H. 42. These different cases and demand to submit the general principle: but still there arises a question whether in the case where by the terms of the Contract the Infant is not bound is he bound by the Original Simple Contract? As in the case of a penal bond: By this he is not bound now can he be bound in another & subsequent promise? Assumpsit in the nature which accompanies the Bond

Hop.

This appears in another question whether the bond was or was not merged the Simple Contract? And this in another whether a penal bond of an Infant is void or voidable? The decision of this question will decide the first one. If it voidable it may merge it. if absolutely void, it has no effect at all on it: The question will be more fully under another head as a division of the subject. Suppose the bond is void: then M^r Dent's covenant the Plaintiff is bound upon the original Simple Contract: express or implied: This is agreeable to principle as well as analogy: A Single Bill may subsist & merge the Contract: the Expectancy or Estate in Reversion which is not void and by this is nothing: he must pay: An Infant can not bind himself for mean Cash, unless the money is actually laid out in the purchase of necessaries.

Co. 78 175-176 / Co. 2 68 a 68. 2 Ves. 444 / Ves. 172 / 3 Wm. 1078 / 1 Salk. 462 analogous

Ed. 166 Bac. Ab. 3 / 154 3 / 1 Vern. 218.

Co. 36. 8 / 1 Mod. 67 / 1 Salk. 279 / 386 / 1 Mod. 38. / 2 Co. Ab. 3 1 8

Bac. Ab. Infancy (C) 3 Mod. 313. 338. (C) Law. The Infant is not bound for the money unless the Person himself is furnished in necessaries, in which case he is accountable rather as a purchaser than a borrower. But in Chancery the Infant if the money is actually expended in necessaries is bound to refund the value of the necessaries: but as the case may be not the whole value of the money Lent: Where the Lender of the money stands in the place of the Person of necessary, and will recover as much as the Person would have done if he had furnished them on credit which would be worth the value of the necessaries: So has been held that where an Infant was a Merchant &c. and purchased Goods to carry on his trade he was not bound: For Law supposes he has not sufficient discretion to make a contract and that the Goods so purchased were not necessaries:

Bac. Ab. Infancy (I) 4 Vin. 419 Salk. 279 Ld. Ra. 192 Str. 1183

So

So also an Infant is not bound to pay 3 Salk. 198
for rebairs done to his buildings. The
rebairs are not considered as necessaries
and may be made by the Guardian.
It has however been decided, that if an
Infant take a Lease of a House or Land
and live in the House till the rent
day arrives or improve the Land un-
til that day, he is liable in either case
provided it is reasonable. but may not
exceed one year's rent, in an action
of "Debt". The Lease is looked upon as
his for the purpose of Lawsuit: An
Infant may be sued for rent or
damages for breach of its Covenants
Covenants - For necessary education, an
Infant may bind himself: but what
is necessary in one case, would not be
considered so in another. The kind of
Education differs in proportion to the
rank of the person: a liberal Education
may be considered as necessary

and

Cro. Jac 309
2 Bulst 69
w 69
1 Brownl 69
65

and proper for the Infant and for the Woman whereas it would be unreasonable for the Son of a poor man. It has been decided however in the Reign of Charles 2d that Incurie and Damages are not adequate parts of an Education. It has been doubted whether this rule would now be Law: it will not apply to the circumstances of many Infants & an Infant may, what in Law or Equity he is bound to do voluntarily he is bound by the act and cannot set it aside: though regularly he is not bound on his Contracts except for necessaries: as in the case of Partition Warranty or Assignment of Dower &c. An Infant when Defendant in Chancery is bound by a Decree but against him it will be that he may on coming of age, or allowance him after he arrives at full age to impeach it for fraud or error. The Cases particularly to be seen.

so as an infant whom Plaintiff is
Chancery is as much bound by a de-
cree passed against him, as an adult
would be: unless there always to be
heard in his proceedings any. The rea-
son of this distinction is that an In-
fant Plaintiff comes before the Court
voluntarily but an Infant Defendant
is compelled to appear: An Infant can
not bind himself by a Contract except
in the cases before mentioned: yet
when he acts as Representative or in
consequence of power in a trust, and in
these cases the general rule is that
such acts of the Infant, as do not affect
his own interest but arise from some
power or authority which he had a
right to exercise are regularly binding
though an Infant Executor may do many
acts not affecting his own interest
a person after having attained full
age may not annul a Contract which
he

(5th Ed. 691
1 Rich 648.
3 " 53
6 " 89 21

a made during his minority and which was not binding and it is a general rule that a promise made after full age binds the promisor to that declared on a Contract made during minority. The Contract however must not be void but they can never be satisfied if an Infant give a security during minority which is absolutely void and after full age makes a promise that promise will bar the foundation for an action on the original void Contract though it can never set up the void Warrant or Security. When then the Instrument is absolutely void the subsequent promise must be the foundation for another action: but in the case of voidable Instrument he may promise being his action on the Instrument and be a plea of Infancy so by a promise after full age. After a person after full age marry a man promising in case

(Ryl & Moo 155.
3 Bar 134

(vide Smith's Contracts

A. Duration

of — Contract — Infancy — Effect of Infancy
Sp. 164
Law is known no better than to the Extent of the Privilege — To a plea of Infancy & a replication of a promise after full age & ratification as far as the Plt is known to subsist it by proving a second promise; he need not set forth that the Defendant made it after full age: it will be presumed that he was of full age and the onus probandi lies on the Infant because the Plaintiff may not know his age: If an Adult is joint interested with an Infant in a Lease, and the Adult obtains a renewal of it; in his own name merely he will be deemed as having acted as trustee for the Infant and the Infant may claim his moiety of it if it is beneficial; but he need not if it is not beneficial: The reason is that Leases are generally renewed and the Adult renewed Lease is a graft on the old Stock: If an
7 Rep. 4b
Sp. 64
Eq. Ca. Ab. 3 pl. 3
Infant

Bract. and Ockl. 880.

Infant is bound on a Contract to which he is not bound to answer pleading it, or give it in evidence under the general Issue. He can not be charged in a Summary way as a bona Fide Contract can be made.

Exception

What Contracts may be an Infant are void and what merely voidable. Of the Contracts by which Infants are not bound are either void or voidable. The distinction between void and voidable is somewhat artificial: but the circumstances resulting, render it very material. It ought to be premised that of late years Courts have inclined to consider that Contracts by which Infants are not bound as voidable merely, and not as void: and this is of advantage to the Infant because, it leaves it in his power to make void the Contract or to ratify it, when he is of full age. Then they have

their

there are few cases in which through fear of an injury to the Infant by Contract will be considered as strictly void - The first general rule laid down on this subject is, that those Contracts in which there is an apparent benefit on one hand of benefit are void voidable, and those on the other hand where there is no apparent benefit or benefit are void - This is not as Mr. Fonblanque thinks, the governing rule; the first or affirmative part is undoubtedly true: for it follows, that the pecuniary of an Infant are only voidable because they are always presumed to be for his benefit. Mr. Fonblanque says he knows of no exception to this rule. If this part of the rule were not true, he could not be a Devisee Trustee or Legatee and he could take & enjoy by no other way than by Contract - Upon the same principle a power of Attorney given by an Infant

2 Ch. 562. Cumb. 520
2 Bk. 511 2 Vent 213
1 Bro C. 333 1 Bro. C. 3
1 Bro C. 38
" 34

3 Bro. 1808 / 1 Rolle 430 / 2 K. 4 E. 3 ff. Infant to accept Livery if sole one made; And it has lately been decided that an Indenture under by the Clause to act as a Servant, was voidable because it might be for his benefit. These exceptions are made to illustrate the general branch of the rule. The latter branch of the rule may not hold universally true: it is therefore not a criterion. Lord Hardwicke has said "that where an Infant made a lease, without receiving any profit the lease was absolutely void." This has been held down as Law, and sometimes to time commended as such, but there is not a single decision on this point as said by Lord Hardwicke in Court. Consequently it does not appear to be well grounded, and besides have also been lately thrown to the contrary. Littleton, however says a lease made by an Infant may be voidable

4 Burr. 2057 / Doe. 337

3 Bro. 806. / 1 Ves. 2 215 / 2 Atk. 308 / Sel. Dec. 349

voidable (as it is usually) but void
Lord Mansfield with reference to reasoning but
there is there a weight of authority on
both sides of this part of the rule? Lord
Mansfield denies the lease mentioned
above to be void: the Judge not taking up
the latter branch of the rule and for-
ced it to be untrue, for it many Dev. & Bat. 78
times is true: but has advanced some 3 Barn. 535
argument which is contradictory
from "that a lease made as above is
not void: 1st The Lessee may make
a lease without reserving rent to the
lessor: Now if this lease was strictly
void the Defendant or one who is a
Stranger to the lease might take ad
vantage of it: but if it may only be
voidable, it can not be by a general
rule that infants deeds are invalid
must void may be given in evidence
But Infant Lessee alone may take ad 3 Bac Abr.
vantage of his deeds infancy it must Tenth 1.
be

void the Lease. This proves absolutely that the Lease of the Infant is not void but voidable: for the general rule is that where the Lease is strictly void the Defendant may take advantage of it. It is then clear on principle that the Lease of an Infant Lessor is not void, if only voidable. It is said again that a penal bond executed by an Infant is void because a penalty can never be a benefit or beneficial to an Infant. There is in Mr. Comyns opinion no necessity that that the bond should be void any more than a Single Bill: for a party may not know that the penalty is the reason that a penal bond cannot be for an Infant's benefit is or has ever been declared to be a good one. Yet they say a penal bond is void in England but is void and void as void. There are some principles common to this case: the principle how ever

Ld. Raym. 54
2 Ld. Raym. 1536.
Salk. 68.
2 Ld. Raym. 1536.
Salk. 68.
Cro. Eliz. 920.
Salk. 186.
Cro. Eliz. 180
Cro. Eliz. 834
Yelv. 193

208. Lord Mansfield it is voidable
4 Burr. Law an Infant can not
plead "non est factum" to a bond nor
give Infancy in evidence on an issue
but must plead it specially: though
a general Count may do this: It is a ge-
neral rule, that whatever makes an
Instrument absolutely void, may be gi-
ven in evidence under the general
Issue: to this rule there are some ex-
ceptions: But what furnishes a strong
Argument against the idea, that a
penal bond of an Infant is strictly void
is this, that an Infant having made a
bequest in his Will, for the payment of
his debts the Court of Chancery will order
that the penal bonds be paid, on the
ground that it is ratified by the be-
quest. But a strictly void bond can
never be ratified: In the opinion of this
Court then this bond is considered only
as voidable. In England it would be con-
sidered

avoid: There are three cases adduced in support of the latter branch which have been considered and will, I think, appear at last doubtful: It is in its nature a vague one and is perhaps a qualification of another rule: The former part of the rule relates chiefly to the purchaser: The branch if not contradicted by principle or authority, is universally considered as correct: The latter branch relates chiefly to those Contracts which create a duty or trust or confidence between them: Such as Bailee, Agency, Obligations entered into by them, avoiding away the interest: The third rule of discrimination is this, All Debts, Gifts, Grants, Sales, Obligations, wages by Infants, which do not take effect by manual delivering are void: that is the other hand which do take effect by manual

3 Atk. 384, 385, 1 Bell 730

Lent

and are relinquished unavoidable.
This rule may laid down Sublitem
tradition Littleton. We will examine
the thing by a few examples. If an
Infant make a Feoffment, this is void
ipso facto voidable and not void. But
what benefit or advantage of benefit
is this to the Infant, according to the ge-
neral rule as laid down above? Sure
by third can be no abatement benefit
to an Infant in entering in any way his
Entrance. The previous thing is the
first way; he can not enter he suffer for
that, but must wait till he arrive
at full age and then affirm or disaf-
firm as he please. But the Law may
not be defined he is twenty one: Why is
this merely voidable? Because the infa-
cy of profit by delivery and he shall
not inconvenient to consider his Feoffe
as a Feoffee after he has once his so
consideration: An Infant sells a Land

this

Prec. Ch. 623
a 32233

3 Bac. Abr. 664
4 Co. 125 a.
8 Co. 42 a. 212
1 Vent. 694

Contract is merely voidable. The Relation is the criterion. It is a Relation not to transfer which shall not be exercised so as to pervert the other party's engagement. If the Sale was void he might recover against a Carrier the other party for Seizure. So the Husband, if an honest man and Executor & procured to pay his Wife's debts but has not returned him: his Contract is void. And if the Wife take him without delivery, he is a Trespasser. Decay if delivered. Then words in the rule "which take effect by delivery" are important as they respect the delivery of Deeds, and when applied to Gifts, they are also important. Hence the difference in Deeds between those which convey an interest and those which relegate a power. The former are generally voidable because they pass by delivery. The latter generally not because they do not so pass.

(Prov. 37, 806, 77, Ellis 430, Cowper 11, Ellis 1198.)

They

enable another to carry it into effect
According to this rule Gifts, Grants,
Leases &c are only voidable, as they take
effect by delivery: a Power of Attorney
by an Infant is void, except in one
case, which is to accept "Service" in 3 Bur. 1808.
interest: because it may not answer Ruy. 13
its intent: it may not take effect by 1 Bl. R. 379
delivery. Powell denies this distinction 1 Bl. R. 46
but does not say: he has no Argument
on the point but only says that the dis- 1 Bur. R.
tinction is ill founded. The general 55. 63
rule is that the Contracts of the Infant
which take effect by delivery are only
voidable. Yet this rule is to be connected
with the following one. Whenever the
Contract is in such a way detri-
mental that the interest of the Infant 3 Bur. 1804.
cannot be preserved by keeping to 1 Bl. R. 379
this distinction the Court are to confi-
rm it as void tho it take by delivery.
This case is well exemplified in a lease
or

Parent and Child

3 Keb. 367 & 369

in Blackstone Peters on Father and Noble in the case of a Maid who sets her Hair to a Barber and afterwards maintains an action of Assault and Battery against him: Even the general rule can be departed from for her privilege and in no case may be pleaded: but it is not in the case of a penal bond, for there it can be answered: Executory Contracts by an Infant and in general only voidable: as a promissory note Single Bill Bill of Exchange: a Penal Bond is an Executory Agreement and is only voidable: And it has been held that a bond executed by an Infant to submit to an Arbitration is voidable and not void: thus you see there are many Executory Contracts of an Infant which are Voidable and the principle ought mentioned to be void and recognized at this Stat: is the end

50

of a Power of Attorney" and the case in Peake of a Contract in writing to which persons in the adverse party may take advantage of it & if it may be viewed by the party for whose benefit it is made as in the Preference Creditors can take advantage of it. This is one characteristic difference between Contracts that are voidable and such as that are void - of an Infant, call a Horse, and Colour it no one can treat it otherwise than as a binding Contract except the Infant or his Representatives. But if he had not delivered it the adverse party and Stranger might have refused to pay it and consider it as void: and an Execution may be levied upon it. It was observed in the last Lecture that the Executory Contract of an Infant could be taken advantage of only by the Infant or his

2 Bl. Rep. 1108
St. Fe 938.
2 P. Wms 625
1 Ves. Jr. 94
Ambler 312
Cowp. 36.
Ante 25

b Executed

Heirs

Page 254.

Executive

8 Coke 42a
1 Bac. Ab. 337
a 339
10 Coke 58.
3 Bac. Ab.

Representatives, and according to the principle by a rule that of a Bond the conveyance of real Estate is made by an Infant only he himself during life and his Heirs can take advantage of it: and his representatives, Executors and Administrators can not take any advantage of it, and can in no respect they shall do divest part with the tenant in tail. Such Contracts of an Infant which are only voidable may be ratified when he comes of full age: and this confirmation may be either express or implied. The former needs no explanation. & however express a confirmation of the binding force of the Contract "but implied confirmation" requiring some consideration: as if a Lease is made by an Infant: Now if the Lessee continues in possession after the Infant comes of full age the Contract is thus ratified: as if the

Infant

infant; & can and continue to pro-
secute after full age in the very action
by Contract: and of course he cannot
bring an action for the whole
rent that may accrue during his
minority and after it for the Con-
tract is only not absolute. This
case of a Lease is only an example
of a confirmation for it is a general
rule that any act of an infant after
he attains full age evincing and con-
tent to waive his right or privilege
of Infancy ratifies the Contract. as
if he take away advantage of it. But
if a void Contract cannot be rati-
fied, and this is one of its characte-
ristics that good pervades and essen-
tial difference between "void" and
voidable Contracts. If an infant take
a new Lease of the same land and the
former term not incorporating therein
a Surrender of the term is void &c.

Co Lac. 320
2 Bac Ab. 69
5 Bac. 554
1 Inst. 172
2 Vent. 215
1 Black. 731

5 Ty. 690
2 Co. 165
Co. Lac 320
2 Vent. 215

3 Co. 84
7 Rep. 25
1 Ld. Raym. 75
Doug. 654
Cro. Eliz. 201
7 Mod. 88

Perth. 357 valuable thing round Leap breaks it; absolutely void. Thus far of the distinction between Contracts which are void and those which are voidable. We come now to speak of the manner in which an Infant may avoid his Contract, which are voidable and here I shall only say as to the time during Infancy, or within a reasonable time after. An Infant may enlarge his interest by deed in Possession (Co. Litt. 380. b. Dyer 250. b. Bro. Abr. tit. Enfant. pl. 3. Perk. 21 Vent. 226) his Lessee and his Grantee may enter during his Minority: but not after: and the reason is because during his Minority the age is determined by inspection and there is nothing against the deed: this is the rule as to Judicial Conveyances: but there is a remarkable difference between this and a Conveyance by Covenant in Law, for by the above rule a Deed executed by an Infant may avoid it by Plea (Co. Litt. 380. b.) but a Covenant by an Infant cannot be pleaded by him

void as in pais. & a settlement for
maintenance either during his minority or after he attains full age.
But it is now settled Law, that he can
not avoid his full age, because the
conveyance is as much available, as
the first conveyance and therefore re-
quires avoiding act. It is
also held, that if an infant
attains full age, he cannot enter to a
void his Conveyance, a Stranger cannot
enter upon the land on the forfeiture of
the Infant, either by virtue of a Feoffment
made by the Infant or by virtue of and
Execution in his favour levied upon
the premises the Stranger has no
right only under the voidable and de-
feasible title of the Infant
and the perfect title of the Feoffee
and the rule is the same as to other
Conveyances by matter in pais, as Lease
& Release &c. It is also by Statute Enacted that
the Deed of an Infant binds him the

Co. Litt.
248. 380a

3 Bac. 1794.
808
1 Bl. Ca. 279
3 Bac. 136.
2 Black. 1151

3 Bac. 3

2 Roll. Ab.
5 Pal. 5 A

covenant

1 Ves. t 380 measuring of thing is that binds him during Infancy. It is necessary to make diligent observation upon Decrees according in Equity on the Subject of Infants Contracts. As they first regard the Priviledge of the Infant at Law. Thus Marriage Settlement agreements made by Infants with the consent of Parents or Guardians are for the most part binding in Equity: Good for they seem to receive they are according to the primary principles Contract which is Marriage. (By this agreement is meant an Agreement to settle property upon the Issue on both sides) This is not allowed at Common Law and they are very little known in this Country. Again the forbearance of the Ancestor ought to bind the Children generally. But in Equity as the Court calls the whole it has a more watchful eye for the protection of young persons that the Marriage Settlements

to

Agreements should be made in order to be just to the Younger Children: that they may have a Settlement. The reason why Chancery can make this Marriage Settlement agreement binding is because this Court is the Guardian of all Infants in the Kingdom. This is a branch of the Royal Prerogative, delegated to the Chancellor: and consequently Courts of Law cannot retain their power in this respect. The King is the parens patriae Guardian of all Infants and by virtue of it these Contracts are enforced in Chancery. How far such Contracts made by Infants are to be enforced in Equity above is mentioned. There is no general Rule on this Subject. Though it is said to be true that the Courts of Chancery will enforce these Contracts. Their power is discretionary. L.C. Hardwicke has said that the Interest of a

2 Ves. Sen. 42. 3 Atk. 375. 1 Bro. Ch. 132.

3 Atk. 113 1 or 2 Vern. 501 1 Ch. Ca. 54 2 Eq. Ca. Ab. 101 1 Vern. 246.

2 Br. Parl. Cas. 57. a female Infant in a Marriage portion shall be bound by a Marriage Settlement or Agreement made before Marriage. It is settled that a female Infant may renounce her right of Dower by accepting under deed and agreement a Settlement by way of Jointure: A Jointure is a Suitable to Dower, and it has been held that she is bound by it, although it consists of personal Estate, which is contrary to the Comm. Law principle of Jointure for by that it must consist of Real Estate. It is said by Lord Hardwicke that it is not settled whether a female Infant can bind his Real Estate by such a Marriage Settlement Agreement. Mr. Fonb. says he sees no difference in Male and female Infants as respects that power. It has however been settled, that a Male Infant may sue for Dower if made with the consent of Parents

3 Eq. Cas. Ab. 104 1 Ves. 55 1 Bro. C. C. 54

1 Vern. 48. 76 2 Chy. Ca. 211 1 Ch. Ca. 32. 2 Salk. 239

Parent or Guardian which is often 2 Ch. Ca. 211
held having been settled by way 2nd Ed. 52
of Strife 604
marriage: So Portsmouth v Portsmouth
case this is a Real Estate and it
has been decided by Lord Mansfield
that if a female Infant being in fact
covenants on Marriage with the con- 2 Atk. 244
sent of her Guardians in consideration 1 Ves. Sen. 48.
of a Settlement to convey the Estate
&c to her Husband: Chancery will
compel a performance of the Contract
So in Mr Fowler opinion may a
Male Infant & Lord Hardwicke shall
keep of this case say it is going a
great way yet he says there and in
cases where Chancery will do it viz. 3 Atk. 393
where the Settlement made by the 615
Husband upon the Wife is an adequate 1 Powell 50
consideration and she every Good:
Again it is said by Lord Thurlow that
the real Estate of a female Infant is
not bound by a Contract to convey it

to

to her Husband: unless after the death of her Husband she takes possession of her settlement. Yet by say the Court ought never to go into the enquiry whether the Marriage Settlement is an adequate consideration for her Real Estate. This however is directly opposed to the opinion of Lord Hardwicke before cited: Upon the whole Mr Fonb. 207 Mr Fonb doubt whether it will bind her unless afterwards ratified: It is agreed that such a Contract made by a Female Infant to convey will not bind her Inheritance unless the Agreement is made before Marriage Brooke afterwards coercion is always supposed. But though the general question, whether a Male Infant may bind his real Estate by such a Marriage Settlement Agreement is not settled yet it is settled that if he covenant with a female adult to con-

3 Ch. C. Cas 2 Ly
3 Cath. 65. Fonb. 72

vey

real Estate to settle in contemplation of Marriage he is bound by it. This is only waiving his right to the Curtesy. According to the current of authority it seems settled that no Marriage Settlement Agreement made by an Infant male or female to settle real Estate will ever be enforced by Chancery, unless it is fair and reasonable and has been bargained for. From the investigation which I have paid to the Subject, he says he finds he settled principles, laid down, which govern those cases. Another rule peculiar to the Law of Equity is, if an Infant capable of making a will of Personal Property dies, bequeathing his personal property for the payment of his debts, his Executor will be compelled in Equity to pay them. Real Debts and such as in Law he is not bound to pay. This is a

2 Ch. Ca. 544. 3 Ves. 7 Vesey 70

1 Vesey 69. 2 Ch. Ca. 44. 1 Ch. Ca. 15. 1 Ch. 137. 3 Atk. 715 Cont. Ch. 4 " 56 1 Eq. Cases " 282

1 Ves. 6. 57 Mond. 4 03 1 Vesey 74

Sale

rule founded on the strictest principle
of Law an Infant may make a
Will of personal property: In Equity
he can make a Bequest: Now in
pursuance of this power can not he
order his Executor to pay this Bequest
as a Debt? Clearly he can: Why
then can not he order his Executor to
pay his Settlement of his personal proper-
ty? There is no reason to the contrary
and it is nothing but a Legacy given
to a Creditor and not a ratification
of a Contract. It has already been ob-
served that an Infants Contract may
be ratified at Law after full age: and
in Chancery a Contract made by an
Infant may be ratified by
him after he attains full age, and
this ratification may be either express
or implied. Express, as by an express
undertaking to perform the Contract:
Implied, by such acts as shew an in-
tention

to receive the money. My father
Lane was bound to remain and
his Children and they bound to serve
to forty one years. When the Children were
not bound by it after twenty one
years and yet they continued for a
considerable time to take rent after
their age and Chancery established the
Lease against them on the ground 1 Ath. 487.
that they waived their privilege
Per Curiam. An infant may exe-
cute a Power, and in Said is and b. Eating
authority conferred by and persons en-
titled, in relation to some right or in-
terest of his by which the power is given
As an Attorney, whose power is given
him by his Client. And with regard
to infants it is a general rule that they can Ves. 2 78.
not execute a general power over &c " 3 do
at Law. By "general" is meant ordi- 3 Ath 675
nary power: and this remains to 675
be as they have been considered. But a Com. Dig
note

Com. Dig. 3 Co. 71 C. 4 Inst. 340. Powell 458.

a trust or special power, that is, where the manner of doing is pointed out in the power, may be executed by an Infant because no discretion is necessary & they interest in any manner affected, nor is there any danger of injuring any other person. She acts as a mere instrument as a power to sign a particular instrument in a particular manner. But an Infant can not execute a power over his own inheritance, it is said, because this may affect his interest; thus suppose John Stiles devises an estate to an Infant for life, and gives him power to make and Estate for three lives: Now this power he can not execute because it might destroy his own freehold. Although they say that Lord Mansfield gave it as his opinion that there is no precedent in Law or in Equity that a power over a Real Estate may be executed by an Infant. By this nothing

Powell 458 Co. Lit. 2 Ves. 326

Barnardiston 3 supra

mere

moved upon that, that there is no instance of a General authority. And it seems that an Infant may execute a General power over personal Estate, even though it is so, that his own interest should be affected by it: provided he is old enough to bequeath it by Will. The reason is, if he is old enough & he is arrived at such an age, as that he is supposed in Law to have the charge of his Personal Property. The result of these rules and authority, is first that an Infant not interested in the execution of a power may execute it, so as to bind the principle to the extent of it, provided the power may not amount to a discretionary authority over Real Estate. Secondly though he is interested he may execute a General or discretionary power over personal Estate, provided he is of sufficient age to bequeath personal

Ves 304 Pow 28. 47. 48.

1 Ves. 363 Pow 28. 54

1 Ves 363 304. 306 Staff v. 324 a Ves 109 Pow 6. 37 1 Pow 2 Pow 23 Pow 45

Pow 54

property by Will. There are certain offices which an Infant may hold, and certain distinctions, observing them which will now be noticed.

What Offices by Infants may be held?

It is a general rule, that Infants may hold Ministerial Offices, requiring only skill and diligence in the execution of the duties; but an Infant can hold no Office, which requires the exercise of Discretion: Such as a Judicial one: He may be a Bailiff Steward or Jailor, but he can never be a Judge of a Court of record or not. The reason why he may hold a Ministerial Office is said to be because if he does not execute it himself by Deputy he may. These Offices are enumerated as follows. The Reason why he may hold this Authority is to be ascribed the Infant can act without him but perhaps the Guardian of the Child

Co Lit. 636. 637
1 Mod 3. 2 Com Dig Title Office 3. E
3 Bac 725 " 736

appeared to be one of the Clerks of the Peace
and Commissioners for taking Affidavits in
the Court of Chancery, and that he
was duly sworn to the due execution of the
said Commission according to the Statute in
such case made and provided. And the said
Commissioners do hereby certify that the
Deponent is a person of respectable character
and credit, and that the Affidavit was taken
by the Deponent before the said Commissioners
pursuant to the Statute in such case made and
provided. And the said Commissioners do
further certify that the Deponent was
sworn to the truth of the matters contained
in the said Affidavit, and that the Jurat
thereof was duly signed by the Deponent
and by the said Commissioners. And the
said Commissioners do further certify that
the Deponent was sworn to the truth of the
matters contained in the said Affidavit, and that
the Jurat

Powers and Duties

3 Ind. 126
Stat. 325

The Deputy may perform all the duties of his principal, and his official acts are binding upon the County, in the absence or vacancy of the principal, or during the time of his office. Either a Deputy or Clerk of tender years may be appointed: But the party may revoke the appointment by the Clerk at his discretion, and the same may be, and he is authorized to administer oaths in taking affidavits, and certificates thereof, and do all other acts for and in behalf of the Clerk appointed. So that an infant may hold and execute his office, and may hold and execute it by substitute; perhaps of an other infant; and an infant acting as an officer is bound by his official acts: and it would be injurious and unjust to the party under the obligation of Law and the authority of it, and if he may an injury the Law will give him redress for it: If an Infant brings a Suit or offers an Issue, he is bound

Parent and Child

How far an Infant is affected by the non performance of a Condition annexed to his Estate. There Condition is one of two kinds, Express or Implied or in a general rule that Infants are bound by Express Conditions as much as others they have not a Conscience to plead. Therefore if an Infant have an Estate in Fee upon Condition to pay a Sum of Money upon the death of a certain Person he forfeits the Estate when the Condition is not performed as much as if he were of Age. This Rule is grounded on the Idea that he who gives an Estate to another has a right to Judge that Estate is meet to be given to him unless the Condition are performed. The Estate goes out of his hands upon the Condition that such things shall or shall not be done but strictly and exception in the case of an Infant

Where

Servant and Child

and void. Condition is to be performed and on failure a penalty is entitled. Here the heart is bound by the penalty but where a matter collateral to the (Jac. Ca. 16 Vaut. 240 Cart 45) deity the Heart is not bound. for they might be driven out of Court by the party of performing the Act not to and indefeasible estate and consequently his possession given him by Law would be destroyed in at law & the Plaintiff

Implied Conditions

Implied Conditions may be created by Common Law or by Statute according to Lord Coke. Implied Conditions at Com. Law are such as are collateral grounded on Skill and confidence or such as are not founded on it, they are bounded with a presumption of skill & ability in which some confidence is put different from this. Implied Conditions at Com. Law grounded on skill and ability in the person to be known, infancy are bound as well as

(Co. Lit. 232 Bac. Abr. II.

Charg=

Parent and Child

Dyer

Ch. and implied Condition annexed to all Offices, that the holder shall use most skilfully and faithfully what is implied by Comm. Law. If they are for want being a Steward, conduct unfaithfully or unskilfully he forfeits his Office by virtue of the Condition which is implied by Common Law But by such Condition implied by Common Law, as grounded upon any unexpressed skill or ignorance, growing out of any Service conferred in the first he is not bound. Therefore rule of Comm. Law that if he Enfeoffed for life a Tenant his Estate in fee, he forfeits his life Estate. This is a branch of the Feodal System, which is arbitrary and the Reason does not now exist but if an Infant being such a Tenant in fee, he may not forfeit his Estate during an Infancy. Co. Litt. 251. b. 1 Rolle Abr. 804. l. 1 Inst. 233.

Ch. implied Condition by Statute Law.

destruction is taken which Mr. Coulter says he may not understand: The rule is this: Where the Statute in favor of the Condition gives a recovery against the tenant for the breach of non-performance of the Condition or Injunction and vests the inchoate Condition Seem absolute & gives an entry Here if the tenant bring a Writ or bring an action & Waste he forfeits his Estate because the Statute of Glouc. gives a recovery against him But where the Statute Gives only damages for the non-performance of the Condition and not a recovery the Infant is not bound by the Condition: as if an Infant aliens without power he may not forfeit his Estate tho' an Adult would. Mr. Coulter says he can see no very clear reason for this distinction. Perhaps it is this "Where the Statute expressly takes away his power

Co. Litt. 202 a
2 Inst. 327 a
5 Rep. 124
1 Co. 421

8 C. 44. b
Hut. 233.
1 Vent 82. 83

privilege: but where it only gives a
right of entry it does not take away the
privilege: and it is a general rule of
law that the privilege of an infant
shall not be taken away by mere
implication - It is a general rule 1 Bac. Ab. 333. 1 Fonb. 82
that infants are bound by the Statute of Limitations unless saved by a proviso
Statutes of charitable uses are in the na-
ture of Conveyances & enure to a right
How in they case the infant is bound Ecclesine
or not there is an exception in
favour of infants by Statute & this takes away Plowd 3
the privilege unless complied with. For 2 Co. 29 b.
this reason the Statute generally con- 3 Bac. Ab. 513.
tains a clause in favour of infants per Eq. Cases
haps does the case in all the Statutes Ab. 384
of Limitations that have been passed
But it is to note that if an Executor or
Administrator or trustee for an infant
do not sue within the infant & attain
or suffer the time to run within the same

Barclay

Parent and Child

by the Statute of Limitations having
power to sue, the Infant is barred by the
Statute, the saving and excepting to
the contrary notwithstanding: and
long if the right both in Law and in
Equity. Thus in the States and Con-
ventions in the note of hand must be
brought within twelve years from
the date of it: how a note is given to A.
in trust for an Infant: unless the true
bar brings the action within seventeen
years a payment on it is forever one
The rule relates to Executors and Ad-
ministrators, and trustees who have a
right to sue in their own name and
not to those cases where the action
is to be brought by the Infant in his own
name. Thus suppose a Legacy is given
to A. and the note to recover this
must be brought in his own name
and the Statute in bar as any other
[illegible] name [illegible]

How Infants are to sue and be sued

the rights which Infants acquire and the duty which they incur by their own acts have already been treated of

[illegible] the mode of asserting those rights and enforcing that duty. As the right to sue

Infant must always sue by his Guardian or Next Friend as in the case of a Guardian or Next Friend appearing by Attorney the Infant is responsible

[illegible] should be taken [illegible] and must be prosecuted [illegible] next friend. But the Statute 4 and 5 Anne c. 16 s. 4 enacts that Infants to appear by Attorney in Actions brought against them

[illegible] against

Co. Litt. 135 a
Bac. Ab. Infancy
3 Bac. Ab. 648 c
3 BC 6.30

3 Bac. Ab. 648
Salk. 295
" 250

Co. Litt. 135 b
3 Bac. Ab. 648 c
3 BC 6.30

3 Bac. Ab. 648
2 Bac. 650
Salk. 295

Parm. 295
Stelly 369

appear for him. through M. Field
or. Ghs. if the Guardian forbid the Said
the Infant and for no other:

6 Vin. 35

5. Where the Infant has no Guardian

2 Bac. 680
3 Ld. 149
7 Jac 645.
Parm. 295
296.

5. Where the Court of the Guardian and
M. are otherwise, he must sue by
Guardian: according to some opinion
however he may sue in any Court by

30 Edw 135
3 Ld. 149
Cro. E. 66.
Hob. 82.
2 Bac. 390
2 Sid.

Guardian or next friend: Record. If Infants
is not taking away the Infants com-
fort and authority? If the Guar-
dian and Wife sue the Wife having no
Estate, she need not abide in Com-
mon Law, for appear by and Attor-
ney appointed by the Husband: Where
an Infant sues by Guardian the Cause
2 Bac 680.
Eq. Ca. Ab. 168
Vin. 36
Eliz. f. 306
1 Vern 426
7 Rich. 491.
Hob. 130

4 Bac. 37
2 Saund. 213

4 Guardian for Costs and is compelled to
give Security for them. So when the
Suit is by his next friend: Either is lia-
ble to the attachment for misbehavior
Recovering to some opinion the
Infant is liable for the Costs, and the Re-

C. 2. 87

covery

may proceed against either at his election. The rule laid down in Williams is stated to be law in a subsequent case where it is said that there is no case where the infant is sued for costs either in Law or Equity: This latter seems to be the better opinion. An infant may not be obliged to give a pledge at Com. Law any one may bring a bill as his next friend: If a case is brought costs cannot be given it will be against the infant Defendant, unless the Guardian or next friend Defendant is liable for costs if so he is liable in the first instance. In England both Guardian and next friend must be appointed by the Court or by writ of Chancery that the infant may not be sued. Any one may bring a Bill as next friend but an infant cannot sue without his next friend for he may at his own [illegible]

3 P.W. 298.

3 Atk. 708
Co. Ed. 23
1 Ch. Ca. 109
Co. Ed. 135
3 Co. 81
2 Eq. Ca. Ab. 2
1 Vern. 130
Co. Ed. 127

Harrison v. [illegible]

3 Atk. 721
Dyer. 60
Bac. 9
Esp. 201

1 Atk. 30
2 P. Wms. 709
Ang. 2032
Salk. 503
2 Ves. 350
Barb. 284
3 Ch. Ca. 45
3 Bac. 46

Bl. 1 [illegible]
1 Bac. 680
3 Bac. 45
151

Parsons

But if the infant dies or becomes [illegible] the
Court cannot take cognizance of the [illegible]
and [illegible] the [illegible] of the
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]

a fine it may be to sue upon the
Infant only. He recovers [illegible]
damages [illegible]

Infant Pa-
tients in
Asylums. How far may the Law regard Infants
in Asylums &c.?

Infants in Asylums &c. are in the
Law considered as minors. They
are thus considered for the purpose
of protecting them from their own
folly. The Acting of an Infant child is
not void but [illegible] great caution
must be [illegible] If the child has given
security & parents consent in buying &
selling &c. they are bound also and then
die of the two and within a year and
a day after the injury done Parents
can't bring [illegible] Infants in
custody of parent may inherit title from
both the estate which descends they
are the first entitled. They may
also take by devise as the Law will
they may also take a Legacy and take

a gift

they are to take under the Statute of Distribution. So a widow and husband having both a right for their children as to what they take living at their death. So a widow and husband in favour of their children of what they take living at their death. Infant children equally entitled to half of their widow's under the Statute of Charles. Infant may have a Testamentary Guardian, i.e. Such as is appointed by the Father by Deed or by Will. An Infant may be a Executor but cannot act until 21 years of age and if administration is granted during his and bonds given will be for Executor. If a one devise or bequeath to the unborn child of A and has and have or have not to they take jointly of the Estate rights and duties of Parents and Children.

The reasoning under this head requires it necessary to consider the different relations

1 Br. Ch. 38
Bro. P. Cas 243.
2 Atk. 117.
2 P. Wms 646.
Pr. Ch. 38.
1 Salk. 247. 2 Ld. Raym. 1535
2 Ld. Raym 1535
Cas. t. Talb. 117.
2 Bro. 123.
Co. Litt 87.
2 Vern 710. 11
1 Bl. C. 451.
452. 466
3 Bro. 125.
Com. 235.
Ca. Ch. 209.
3 Bro. 125.
Ca. Eq.

between legitimate and illegitimate children for their rights and duties are different when referred to those two orders of children. Those born out of wedlock are legitimated and also are Foreign-

1 Ves. 444. 2 Ves. 444. 2 Ves. 521. bands. A bastard child is defined to be one born in lawful bedlock or within a competent time after marriage tho' not begotten after marriage, is reputed legitimate: but it is not true if a woman has a child born out of wedlock it is legitimate. Children born, however, of

2 Ves. 485. 2 Ves. 444. 2 Ves. 98. 2 Bl. C. 93. illegitimate children: the illegitimate child is defined to be one begotten and born out of Lawful Matrimony: or in other words not begotten and born during Lawful bedlock. The definition also of Bastard according to the civil law is: Such a one whose father and mother were not married at the time of his conception or birth. Although the parents intermarry and the father does before the birth of the child legitimate it, it is not according to

the

the definition of an illegitimate child
ought one begotten out of Lawful Wed-
lock and the Husband having Lawfully
been in visible access at Natural times after
conception. The true definition of a legiti-
mate child appears to be that
of a child is born during Lawful Wedlock 1 Bl. Com.
the presumption is that it is by him, 457
and in this case the presumption is
very strong. The Husband was then
proof of illegitimacy was admitted in Co. Litt. 244
Birth & case have proved an unusual 7 Co. 28.
Legitimacy in both the and that fact 2 Salk. 123
could be proved but in two ways: 1 Bl. Com. 457.
1. By showing the impossibility of Co. Litt. 244
sex by the Husband to the Wife and 2. By Bulw. 318
showing his impotency: this rule at pre- Bl. Com. 457
sent is altered below. The usual Bast. 1 Barn. 3 Salk. 123
other proof of the Husband's non-access 483. 123
was the absence that of his Husband for 1 Str. 83
the period between the time of 2 Ray. 1095
conception & the birth: if he was within

the

Consent and Child

1 Rich. 2. c. 8. the children consent shall proceed. Persons of the Christian faith have power to give children in marriage at any time however young after the celebrating the Christian rites have been agreed upon between the two parties; but it is ordained, that the children of the age of seven years be betrothed by their parents consent, and the man shall not have the woman to his wife before the age of twelve years, nor the woman to the man before the age of nine years; which betrothing shall not be firm, unless the parents consent thereto at the time they are betrothed, and they continue in the same consent when they come to the age of twelve years. The parents consent is left to the young to

declaration, when the parent is under
stress of the same and they are
dead pro tempore the husband
has been within the realm. Impotency
may might also be proved by other evi-
dence than want of age. In by the Civ
same state of health. Five males
proved to admit no other proof of im-
potency than what amounts to ap-
parent impossibility. It has lately been
settled that other evidence than that of
non-access and impotency is admis-
sible to prove illegitimacy viz that
the mother cohabited with John Stiles
& the child was reputed & baptized
called by the name of John Stiles and that
the mother took the name of John Stiles
&c. gave birth unchastity only and
is no direct proof of non-access or
impotency. The issue of a marriage
which is void ab initio is il
legitimate. So in the case of a bigam-

Powers

1 Roberts 360. 7 Coke 41. ... termed for a man existing before the marriage which would render such a marriage unlawful. But the validity of the marriage not affected nor can be called in question only during the life time of the parties. The issue can not be bastardized after the death of either of the parties as issue born during Wedlock. A child begotten and born after a divorce a mensa et thoro is presumed to be illegitimate. Even in the case of a voidable by declaration the presumption in favor of legitimacy may be rebutted. When the question of legitimacy is to depend on that of marriage the wife is not admitted to prove non-access. She is prevented by delicacy. But she is allowed to prove her own incontinency from the necessity of the case. The former wife is permitted to prove non-access and incapacity. The husband cannot be allowed to prove the time of the child's

1 Roberts 360. 7 Coke 41.
1 Bl. C. 449
1 Phill. 550. 1 Hagg. 557. 2 Add. 63. Ross. 5. 2 Hagg. 42. 1 Roberts 357. 5 Ves. 184. 1 Salk. 122.
Cowp. 590. 1 Phill. C. 2. 1 Hagg. 2. 1 Add. 2.

child to his Father or Mother Grandfather
or any up to the 4th Degree: So
also a relation of the Father or Mother as
to the child's having been born before their
Marriage may be proved after their
death. But it not to bastardize any
born during wedlock So an answer
to discovery is good evidence against
either party. So Translation, common
reputation, entry in a Family Bible
admissible as to the time & manner
existence of a child's birth and death
So Children born of a Widow during
the Husband's absence Held by the ma-
jority of the Court to be
by issue and bastard. They may not
come with a mandamus to prove after
Marriage. What the mandamus time
is stated in the Opinion of the Court
was not previously mentioned in either
case. time after the Husband's death a
child must be born to be legitimate

Comb 4th

Comb 59

Comb 59

Comb 59

Co. Litt. 123 b. The days of the month in law parts

Bac. Abr. Bastard (A) Bulle. 35. Bac. 37. Co. Litt. 123 b. The days of the month in law parts

Bac. Abr. Bastard (A) Salm. 123. Bl. Com. 455.

Bac. Abr. Bastard (A) Bac. 37. Co. Litt. 8. Salm. 123.

Bac. Abr. Bastard (A) Bulle. 35. Bl. Com. 455. Co. Litt. 8.

Bac. Abr. Bastard (A) Bac. 37. Bl. Com. 455

Lawrence v. Dana, Fairc. Eden Bankr. Cases 1 vol. 1 Law Rep. 63

If a woman marry immediately after her husband's death & she has a child which according to the usual course of gestation might be the child of either father, it may when it arrives at the age of discretion choose either of them for a father. It is said she may not be baptized after his death. (c) Proved to have been a husband's personal defect, die with the person. (But the words only between a child born before the writ of marriage of the parents, and the lawful issue of the marriage. If there the bastard enter on his father's estate and dies seized his issue shall take to the exclusion of the brother. (But to exclude the mother there must have been a recovery against the bastard for dower by the bastard and account to his issue. Hence during his life the mother may enter & have dower. So if he dies seized & his death.

(c) Bro. 315. 7 Co. 44. 68. Co 2 Inst. 35. 245.

Dyer 180. 1 Co. 98. Sav 68. 120. 3 Leo 110.

1 Roll. 355. 1 Bro. 3.15. 7 Co. 44. 6. 2 Inst. 53. 245.

Co 2 Inst. 245. 1 Roll. 355. 1 Bro. 316.

Of the rights and authority of Parents. 2 Black.

Natural Rights and Obligations of Parents

The rights of a bastard are only such as he can acquire for he can inherit no thing being called "Nullius filius" in the eye of the law & may even bar his own offspring (But the reason that he is filius nullius 1 Bl. C. 458. 2 Lev. 168. 2 Show. 168. 2 Ld. Raym. 1066. is because he is born out of lawful wedlock & so is not within the prohibited degrees. Not to cases in which the law requires the consent of father or mother to a child's marriage under 21 years is only to the case of illegitimacy and as according to authorities a bastard is quasi filius nullius because he can not inherit 1 Bl. C. 459. 2 Kent 215. 1 Salk. 123. 2 Ld. Raym. 1094. He may acquire a surname by reputation though he has none by inheritance but he may procure by his own act any surname. So he may by the name and description of John Doe &c. &c. by the reputation of being John Stiles pro tem. By the description of your humble

pro tem

Parliament Roll & Writs

Dy 24

objection it is obviated in this case and the Court below erred. It is not likely to be the case in ordinary cases that a child of tender years will have any property to the prejudice of the parent, but if not the Court has no right of a Court of Equity to say that the parent shall have the benefit of the child's property. Everyone knows that the better opinion seems to be against the limitation. Here we have no facts except those of his own age; for all that he could not be treated as a minor in Canada and he has made Mr. Bigelow a Canadian attorney which is peculiarly in the place where he is known. If the child were in another Parish with the mother, for purposes of life the parent must support it. There is an exception to the rule where a child is of tender years when the Parish in which the child is born. E.g. If the mother is not by reason of the fact a Parish in which the parent lives is bound

relieved

delivered. Now the child is settled and is in the Parish from which the way rent of — of the duty of Parent to their Natural children. This duty of Parents to such children consists chiefly in their obligation to maintain them; and in the mode of performing this duty in England see 1 Bl C 457. Through the relation of Parent and Child is not recognized as to persons pure 1 Bl C 457 & civil yet as to certain natural duties it is — The Law in England on this subject depends on the Statutes 18. Elizabeth 1 James 1. & Charles 1 and 43 Elizabeth 2 and 6 George 3?

Of the mutual duty of Parents in relation to their Legitimate Children and vice versa:—

1. The duty of Parent to such children consists principally in three particulars, viz. Maintenance, Protection and Education.

to labour or otherwise to provide [illegible]
Infants are never responsible to
[illegible] at Common Law. In England
children are under a legal obligation
to [illegible] their children. The
obligation on every parishioner in England
is only secondary. Relations are liable
in the first instance. Grandparents are
not liable if the parents have property to
support them. So grandchildren are
not liable if parents are able. In Eng-
land a man is not obliged to support
his wife's children by a former husband
even during coverture. No question can
be made as to his liability at the
time of marriage. The statute of 43 Eliz
extends only to natural children.
But is not the true principle that
the husband is bound if of ability
he may go & take her own name
[illegible] to support [illegible]
[illegible] where [illegible]

St. 9 Geo. 1 c. 7 s. 2
2 Burn 3 s.
1 Bl. 447

2 Bl. Ch. note, 448
4 T. Rep. 48.
Esp. Dig. 2 Burn 3 s.

St. 9 Geo. 1 c. 7 s. 5

3 Bl. Ch. 447
Stat. 2 s.

to be of the use Clearly a person is not
Eliz. 191 bound more than he declares to and binds
2 Salk. 345 his Heirs Executors & Assigns. Where Debt will
not be precisely to be brought if it were at the
time of Marriage. The Deed is not bound
to perform his words after a Divorce
or Separation at Bar. If a Woman marry
a man who has a Wife living
Mar. 11 & Paul 11 Mar. Bayland he is not bound by the Act
of Parliament to maintain them. But if
a Feme Covert be Lord a Feoffment
of her Lands by the name of a Feoffment
Deed by her Husband and Lord
Feoffment by the Husband and Lord
Feoffment by the Husband and Lord
Feoffment by the

Parents and Children

Parent and Child.

Here I am presumed to explain to inferior the only words that pass between parent and child out of obedience to the Power of the Poor or Justices and Parents are given under a penalty to bear under a obligation to be answered in the Spiritual Court. The Duty of Children to parents is their obedience to be and be subject to them in their infancy to submit them when parents to instruct them with due respect.

Of the Rights and Powers of Parents

The Parent has a right to correct his minor child in a reasonable manner this right is to be founded in the Parent's Duty. By the Roman Law the father had an absolute power over his children & wife. But now if the parent use the power of correction in a cruel manner or with malice they may be punished by

Parent & child

A decree that the child must be educated in accordance with the religious views of the father will be enforced against the mother, although the father has power of appointing a guardian by deed or will to act after his death. The father cannot by his testamentary power of appointing a guardian to act after his death deprive the mother of the custody of the infant during her life, unless she has forfeited her right to such custody by her misconduct. The consent of a parent to the marriage of his child is also required by the Burials Act and unless with such consent the marriage is void in England. But even the marriage is good but the person who married them is liable to a fine.

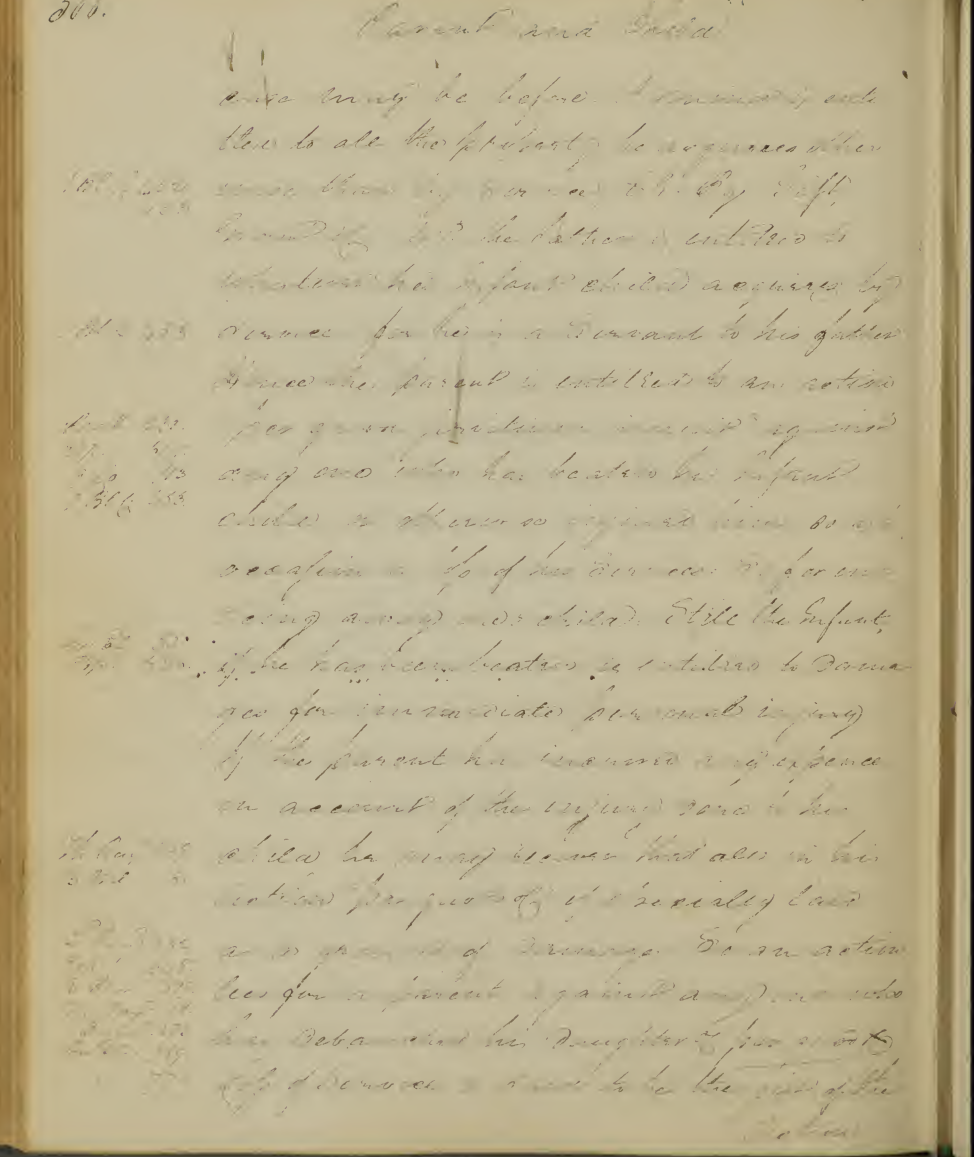
3. The parent has no power of his infant child's estate other than as a trustee or Ecclesiastical and is liable as the case may be in any action where the child sustains damage by the act or default of the parent or the

Ante p. 71.

12 & 13 Vict. c. 68.

19 & 20 Vict. c. 119 s. 52 Brown v. Hume.

Parent and Child



action [illegible] the original
cause by new the [illegible] cause for
[illegible] and action to be taken would
be the injuries incurred by the husband
in which [illegible] may be recovered
in [illegible] and [illegible] not the
[illegible] suffered an action for the loss
of [illegible] service [illegible] to be for
[illegible] was alleged that the plain
[illegible] was obliged to support her. She was
[illegible] years of age. But the life of a
man is not the sole or principal cause
of action. The real cause of action is
the [illegible] and injury occasioned to
the husband [illegible] to which the loss of
[illegible] is sufficient. It is not necessary that the
marriage be in any way proved [illegible]
to the loss of service. It will [illegible] though the
[illegible] in a [illegible] way. [illegible]
to the parent cause of [illegible] [illegible]
[illegible] Daughter. The character of
the Daughter [illegible]

Stile 348.
Poles 3
Pyk. 3. 3.

3 Pyk. 8
Ray. 235

3 Bac. Abr. 558

Keb. 58.

3 Mod. 9
Sir. 570.

1 Hal. 4
1 Wms. 56

Cook. 25

measure the Quantum of Damages. Even when the Daughter is living with other Men for Hire in mitigation of Damages.

4. Actions of this kind have failed notwithstanding Loss of Service: where there was no seduction as in the case of a common prostitute: as where the Father has invited the Defendant being a Stranger to visit the Daughter (But it seems it has been holden in the Case of Bastardy Laws 187. 1 Rol. Ab. 69. 1 Vent. 295. 2 Lev. 210. 1 Sid. 370. 1 Keb. 958 likewise in the present case that the Action may not lie unless the Daughter is in some way proved to have been the Servant of the Parent. It has lately been holden that it need not be proved that she actually lived with her Parent. Sufficient if she lives in his Family. She is of course deemed his Servant under 21 years of age. The age of the Daughter however is immaterial if she acted as Servant to the Parent. Loss of Service being the Foundation of the Action

4

Conrad and Wife

of some certain Plea for the Defendant with
and assign reasons or reasons thereon for
the Plaintiff is said by Comyns in the
6th Page of his Digest that the Daughter
should be in her Father's House at
the time of the injury done: Quere if so
in all cases? Suppose she be sent on
a Journey to Bath or Epsom another
House for the benefit of her Health? If an
Assault the Servants would be necessary
witnesses the other maybe out of the
Kingdom the Father dies and the
Daughter lives with and attends
her Mother, Parents, or any Friend Elsewhere
Master: In all these cases the Daugh-
ter's Service is a good writing because she
is not to be present in the Court: But in
Law for debauching a Servant is substan-
tially one action as the case
But when the Defendant has illegally
entered the Plaintiff's House the Plaintiff
may sue for breaking and entering his
Close and lay the Debauch as a
Special

3 Bac. Abr. 318
Dr. Ver. 8. 78.
2 Wils. 89
Peake 55
3 Mod. 18
Bac. Abr. 317
Wilson 9
2 Burr. 566, 7
Cowp. 388
Wilson 35.
2 Wils. 4
Comp. 37
2 Bac. Abr. 317
2 Wils. 347, 8
Comp. 1032
1 Bl. 558
2 Bac. 313
Comp. 1032
Ld. Raym.
1 Ld. Raym. 1032
Comp. 1032
Ld. Raym.

Grand and Petit

a magistrate [illegible] by warrant
Here the action is laid in [illegible] and that
on estate [illegible] the good of the nation
is the inducement & ground of the Suit
But if the Cattle were taken in [illegible]
cause to enter the Sheriff of England
2 Roy. 6. England may seize and be [illegible] for
[illegible] Quere Whether he can
[illegible] for Cattle damage feasant
2 Bl. R. 34. without asking [illegible] & driving it
2 Bac. 372. 2 Yelv. 144 elsewhere [illegible] Cattle
3 Bur. 1789. damage feasant? It seems it may
for the Parent has an interest in the
Child to answer for its Education
The Authority of the Father ceases when
the Child attains the age of twenty one
he is then emancipated. The Mother as
such has no authority. Where the
1 Bl. R. 450 real is [illegible] to be with the Son
of the Father = Ex amicabo: Yet a Father
is the proper person to [illegible] for the rents
of his Children 2 P. It is liable for
[illegible]

Parent and Child.

Parent liable for child's torts.

Where torts in the course of service of servant

servant

Master cannot be liable for the torts of his servants he is liable in all cases where they being employed under his control are otherwise liable in their capacity as Master and the servants acting in the course of control for the employer

Servant liable for his own torts.

---

(2) The different Forms of Government Effects
their respective merits.

A Government is a Power for using the
Power of a Person or Persons in
Society for their Protection

A Child under a Guardian called Wards
is known to be of the Guardian his
Power of both the Person and Estate of
the Ward &c. Life is a certain Thread
of various Length called a Time
[illegible] of
Time [illegible] Time
Time [illegible] Time
Time [illegible] Time

Conveyance and Transfer

before that time 3d. 9th Conveyance
by Custom in the Port of London
1st Conveyance and Transfer by the
Port Duties and Port Charges

2d Conveyance of the Vessel: this duty shall
only extend there in the other parts of
the by Law in the 4th Section of
the Custom This Vessel is of the regis-
tered at the Port in use over three
Conveyance (3d) and it does before
Section is duly Conveyed to have been
Vessel Custom in Port on the Vessel
Vessel is to Conveyance Conveyance
Port 2d Conveyance Custom Conveyance
Conveyance by Port Vessel Conveyance
Port Port Vessel Conveyance Port
Conveyance Port Vessel Conveyance
Port Vessel Conveyance Port Vessel

Guardians and Trustees

By the statute of the 32nd of Henry VIII. cap. 28. sec. 4. the power of disposing by will of lands held in socage was extended to all persons of the age of fourteen years, except married women, and persons of non-sane memory. Previously to that statute, infants could not dispose by will of any lands, even where the custom of the manor allowed it. But infants were not permitted to dispose by will of lands held by knight's service, until the statute of the 12th Car. II. cap. 24. took away the military tenures, and converted them all into socage tenures. Infants, however, could not dispose by will of copyhold estates, even with the consent of the lord, until the statute 1 Vict. cap. 26. sec. 3. by which all persons of the age of twenty-one years are enabled to dispose by will of copyhold estates. The law as to power of the crown to grant custody of the property of infants, and the

By stat. 32 Hen. VIII. cap. 28. sec. 4. 1 Mod. 283. Salk. 236. 1 Ray. 730. 1 Vern. 270. 1 Cruise. 110. 185. Co. Litt. 113. 2 Bac. Abr. 570. 2 Black. Com. 498. 2 Inst. 260. 3 Mod. 177.

(a) 12 Car. II. cap. 24. sec. 8.

1 Vict. cap. 26. sec. 3.

Guardian and Ward Act

Contracts and Grants

the Secretary of the Treasury from age or disease of the Grant or any kind should require it. But the Commissioner must direct the said [illegible] of the Grant under a Power of Attorney for the purpose of Grant to receive

2. Be satisfied that the Commissioner of Pensions [illegible] the Navy Agent in Boston [illegible] Grant [illegible] Secretary of the Treasury [illegible] Commissioner of Pensions [illegible] Boston [illegible] Secretary

Guardian and Ward

[illegible]

Indian Treaty Board

[illegible] and [illegible]
[illegible] of the treaty was granted to be [illegible]
[illegible] in a particular manner
the Provinces be [illegible] at the
creation, the Dominion may [illegible] this
election the [illegible] of the people.

Extradition of Criminals

The Extradition Act [illegible] enacts
no authority never [illegible] to any
[illegible] Act. The Act is therefore
[illegible] of the Treaties to [illegible] Feb.
and [illegible] to [illegible] 1842
to [illegible] and [illegible] (No. 10)
[illegible] to be [illegible]
[illegible] arrangements for the [illegible]
[illegible] is [illegible] [illegible] [illegible]
[illegible] the Treaty [illegible] [illegible]
[illegible] arrangement [illegible] with the Treaties
[illegible] the [illegible] [illegible]
[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]
[illegible]

328.

Guardian and Ward

330

Master and Servant

Lecture

A Servant is one who is subject to the personal authority of another.

A Master is one who exercises such authority. A servant is personal authority to constitute this relation.

1 Bl. 423. 1 Burr. 468 & Salk. 456.

A person employed to bind authority is not a servant. This authority is generally created by a contract between the Master and the Servant and some other person. There are six species of Servants known to the Law of England and U. S. 1. Slaves. 2. Apprentices 3. Menial Servants. 4. Day Laborers. 5. Agents. Factors, Brokers, Attorneys &c. 6. Seamen assigned in service by a Statute of the Realm.

The first and last of them species are unknown to the Common Law. We will now treat of these several species of Servants in their order.

Master and Servant

1. Of Slavery: It is doubtful whether any Law can authorize Slavery in Connecticut. If it is legalized there or any where it must be either by the principles of Natural Law, or by the Common Law. If it is authorized by Natural Law it must be either by "captivity in War" "Contract" or "being born a Slave". In captivity it is said that the Captor has a right to kill his prisoner. This however is not true. He is bound by the Law of Nations, which is the Law of Nature, & by it Nations have granted his prisoner. He may kill him in case of necessity but not otherwise. 2. By Contract. A Contract can be the foundation of a real Slavery only when it is absolute, & gives entire liberty over the property: & the principle is this, that a Contract is void, for a man can not dispose of his life nor his liberty. & by this Contract he can contract

P. Parker 2 Mass. R. 23. Case

our it, yet here is no Consideration
consequently, the Contract is void.
Hence to become a Slave by Contract 1 Bl. 425
is void impossible. Sale a Contract 424
to serve another is good.
So as to the third: but being born a Slave
If the two former fail the latter must 5 a. Ch. 666
of course. The Common Law owns not Salk 1.
one jot of Slavery of any kind.
A foreign Slave on landing in England Salk. 679
becomes ipso facto free in the enjoyment 666
of personal liberty, property and per- Lilt. Tenures
sonal Security. Sec. 189.
194. 204
2 Bl. Com.
3 Hume. His. of Eng. 387
Slavery in England was abolished by
the Statute 12 Charles 2.
It appears to Judge Reeve that Slavery
has been and is now legalized by our
own local Laws. he says they have no
Statute in Connecticut authorising Sta. Con.
Slavery but there and Statute com- 141. 228.
ing on its resistance: making certain 237. 396.
" 399
being the entry of Negroes: to smoking
slaves:

providing among for the manumission
of Slaves providing also that the Slaves
born should remain servants unless they
have a certificate showing their freedom
& The Supreme Court of Connecticut has decided that Slaves could
not sue for the recovery of a Slave but he
5 Conn 555. was to obtain his freedom and subsis-
tence should absolute slavery never did exist
in any of the United States
3 Mass Rep. 326 The Marriage of a Slave with the consent
2 Hall L. Jour 54 of his master is upon principles and common
equitable so declared in Connecticut
by the Supreme Court of the State
It is a question whether an illegiti-
2 Peters mate Child can be a Slave by birth if
it should live and be raised
The wages in Connecticut have always
been accountable to the Slave and that
2 Root 3 it follows the Condition of the mother.
Parties Egyptian Bondwoman &c to the
Arabian

But not

So

ce of the Child: the Child can not ja
bow in the age of the Law.

2 Ill Cent
Sec. R. R. 188

The importation of Slaves has long since been prohibited: and those in Connecticut born since 1784 and before August 1797 are by a Statute made free at 28 years of age, and those born since 1797 are free at twenty years of age. It is generally agreed that Infancy may be properly endured to Slavery by Crimes consistent with the Comm. Law: by a Civil Injury to the Public: N.H. Infractions.

Scat Con
599 & 60

So extra from the French word Apprendre to learn. Generally true and bound for the purpose of learning something: sometimes they are bound to Mechanics and often to Husbandry. It is a rule of the Common Law that every Apprentice must be bound by a Deed. consequently a parol Contract of Apprenticeship is not binding.

3 Pick 420

Master and Servant

There is no reason for this strong construction unless personal liberty is sacred so high that it can be bartered only by a Deed. This is the only instance of a Deed being required to a Contract creating a right or to personal Contract. The Servant loses his personal liberty during the time. It has lately been held in England that a defective title as Contract of Apprenticeship, cannot be construed into a Contract of hire. for year or month. Formerly it was held that the relation of Master and Servant could not be created unless the Servant be actually retained by the hand of Apprentice. The reason is not clear. Here Servants may be retained by parol agreement. The Statute Law of England provides that no person may be apprenticed out by the Overseers of the Poor or with the consent of two Justices. Males until they are

6 Anne 18
20 Geo 2 19
5 & 6 W & M 28
2 Term. Rep. 476

8 Geo 4 c. 52 s. 3

3 Bac. Abr. 550
3 Wils. 345
8 Mod. 333

Master and Servant

the age of twenty one and females under eighteen years of age - 5 E. Statute 4 Anne Parlem. The same Law provides that the persons to whom Journeymen and Apprentices are bound to receive them. There is a similar provision in the Statutes of Connecticut enacting that no person is bound to take them. Our Statute provides, that Children liable to serve to learn: this not well provided for: those who are idle & rude and stubborn may be bound out by Select men with the advice of the next Assistant: Females till 21 & Males 21 years of age. Select men and Tything men overseers of the poor.

All Servants except Apprentices and of Common right entitled to Wages: Unless there is no Agreement the proper Action to institute is a Quantum Meruit - Menial Servants in England agree on their Wages, but the Wages

Master and Servant

1 Bac. Abr. 494. Wages of Servants in Husbandry is appointed & ascertained by the Sheriff at the Justices of the Sessions — In Connecticut and most if not all of the United States, the Wages of all Servants are settled by the Parties: and as in England except in the case of Husbandry. The Law will always imply an Agreement for Wages with other Servants, but for Apprentices never. Apprentices are regularly not entitled to Wages, unless it is so stipulated that they shall have Wages, but then they do not receive them as a common right — A Statute of 5 Eliz. 4th enacts that Minors may bind themselves as Apprentices the Statute 5 Eliz. 4. but be paid they and not bound by their Covenants, and it is so decided — The only effect of this hidden law is that while they remain in service the relation de facto the parties respectively enjoy the rights and incur

1 Bac. Abr. 494. 2 Inst. 667. 1 Burr. 228. Cro. Car. 179. 1 T. R. 708. 7 T. R. 716. Doug. 381.

5 Eliz. c. 4. s. 31.

etc

Master and Servant

the penalties of Master and Servant Dan p 518
Acts if the Servant cannot by kind
usage, he shall be free of his bond
If a Father binds his Child by an
Indenture, the Father or Guardian is
liable for a breach and not the Child
The Father or Guardian is bound for his
faithful service - The Indentures
are generally signed by the Father
or Guardian consequently they are liable
- There are certain duties which
result of course from the relation:
The Master is bound to provide necessaries
for, to protect and stand in the
place of a Parent to the Apprentice
Hence ill usage or abuse is good cause 1 Atk 518
for the Servant to leave the Master
It is often laid down in the Books
that an Apprentice can not be dis-
charged except by Deed - This needs
some qualification - The Apprentice
can if his Master wishes be discharged
by

Master over servant

by Marriage. The Clerk or Servant of the Apprentice is discharged by Agreement he must be discharged by Deed with all & cannot be discharged several other ways. Executing the Indenture amounts to a discharge by Agreement of both parties. Assigning with the Indenture to the opposite party also, also if the Master discharges the Apprentice by Deed he can not maintain any action against the Master. The Master cannot maintain an action against the Master for he was guilty of a wrong and if he was found in the Master then to turn out with the rest. The Servant is not to go out for on a Dismission of the Indenture = If the Master turned away the Servant and after wards he would have to return and he cannot turn him away. Then an action to recover back And this on the principle that the Master can not maintain an action against his

Lilly Ent. 48 Salk 68 Comb 68

Cro Eliz 382

Cro Eliz 878 Yelv 65 Cro Jac 474 2 Vent 152 2 Lev 174 Bk 574 Day Abr 153

In a subsequent Chapter we propose
If the Master had not requested him to
return the Clerk of the Servant that he
may know what wages have been paid
him. We conceive the above case to be
analogous to the case of a Servant to go
to the Market to buy a Horse, or
hired Servant with a Cart to go
for Coals, after an agreement
for a certain Sum, if he have
any thing on the Journey he may
sell the Horse and the Cart is no
Felony. There is a Statute in Scotland
not enabling the Court of Session
to punish an Apprentice for
fault of the Master, and by the same
Statute if the Apprentice is guilty of
misconduct the Court may punish
him in a summary manner.
In England the same thing is done by
the Court of Sessions & by the Justices of
the Peace the Apprentice act, & by the
Justices

Book of Clerks

Stat Scot 1705

Master and Servant

Justice with the right to appeal to the Court of Sessions. The discharge may be in consequence of the default of the Master or the Servant. The Master as well as the Servant may apply and procure a discharge from the County Court having shewn an reasonable cause.

3 Burn J. 21 Ed. 6. c. 26

By a rule of the Common Law, but Master can not assign his Apprentice for he is a Contract personal and confidence in the Master the trust is fiduciary. One who binds himself to the Man or is bound to him may be willing to be obedient to the man and yet not be willing to serve any other man to whom he may be assigned: By the Custom of London Apprentices may be assigned. Hence if Arbitrators award that the Master assign his Apprentice, this award is void, for the trust is fiduciary and is not trans-ferable any more than assignable.

2 Lecture 9.

Holt 234 Salk 68. 12 Mod 525 3 Bac. 525.

Ch. 87

But though at Common Law the assignment of an Apprentice may not defeat his interest, yet the assignment is good between the assignor and assignee so as to bind the assignor. 1 Str. 683 Salk. 68. Holt. 96. Dougl. 69.

The rule that an Apprentice is not assignable is for the benefit of Apprentice, and the rule gives no better than the object of it requires. But if on such an assignment the Apprentice voluntarily goes to the assignee he acquires the rights of an Apprentice and becomes an Apprentice de facto: he also gains a settlement if he serves his Master, and Lord Kenyon thought he became free of his trade. On the same principle the Master cannot assign if he is bound to keep the Apprentice under his own care. He has no right to send him abroad, even for instruction in his trade unless the Contract admits it or the nature of the case requires it. Holt 5. 6. Bull. N.P. 40 8 Mod 280 2 Mod 246

Master and Servant

2 Roll Rep 583
Style 103
Sackv 18.
Cro Car 85

It is ruled that the Executor of a Master can not take an Apprentice after the Master decease for on the same principle, that the bond is not assignable, it is not transmissable. It was once holden that the Executor was liable on the Master's covenant to teach, and was bound to procure the Apprentice to be taught But seems to be against the former rule and is denied to be Law.

Lev 29
1 Sid 216
Dyer 29 pl 15
Raym 65
Held by
Levinz Law
of Parliament
page 295

Whether the Executor is bound to furnish diet &c necessaries to the Apprentice during the time agreed on, is a question the current of authorities and that he is bound even though he has no service or consideration.

3 Salk 66
Cro Eliz 553
1 Roll Rep 451
320
Dyer 32

The ground of this decision is as Judge Reeve supposes, that the Covenants are independent, one to serve and the other to furnish necessaries. The Covenants must operate as independent unless it is otherwise stipulated.

Executor and Servant

There is no reason for the distinction
whether the Executor is named or not.
The Executor is bound of course by all
the personal Contracts of the Testator.
Judge Bronson differs in opinion from
Mr Gould as to the Executors liability to
provide maintenance for the Apprentices
The ground on which the Testator was
bound to supply the Apprentices with
necessaries was that in consideration
thereof he had a right to the personal
labour or earnings of his Apprentices
The Executor clearly has no right to
his earnings, or control over his person:
there is therefore no Consideration
for the Executors liability. Judge Bronson
considers the bond to be an entire bond &
not two as Mr Gould supposes. If the
Executor is liable the trust is transmissible; if the Executor is not liable, the
trust is not transmissible.
In England a precedent of Personal
Estate

Master and Servant

1 Roy. 383 / 8 Mod. 122 / 2 Salk. 68. / 2 Ld. Ray. 867 — It is pretd that the Executor of a Master can not take an Apprentice after the Master decease for on the same principle that the head is not assignable, it is not transmissable = It was once held that the Executor was liable on the Masters Covenant to teach, and was bound to procure the Apprentice to be taught This seems to be against the former rule and is denied to be Law

Cro. Jac. 593 / Sid. 216 / Dyer 29 / 3 Keb. 68 / Lord Raym. Case of Parmenter / 2 Salk. 675 — Whether the Executor is bound to give such victuals necessaries to the Apprentice during the time agreed on, is a question the current of authorities and that is a point even thought he may have no assets a a consideration =

3 Salk. 67 / Cro. El. 525 / 1 Roll. Rep. 420 / Dyer 29 — The ground of the decision is, as I suppose (Lord Holt) that the Covenants are independent, one to serve and the other to furnish necessaries = Thefe Covenants must operate as independent ones for it is thereby stipulated =

Thurston v. Prescott

Qu. Here is put in issue, the question whether the Executor is named or not. The Executor is bound of course by all the personal Contracts of the Testator. Judge Dean differs in opinion from Judge Pond as to the Executors liability to provide necessaries for the Apprentices. The ground on which the Testator was bound to supply the Apprentices with necessaries, was that in consideration that he had a right to the person & to the earnings of his Apprentices. The Executor clearly has no right to his earnings, & cannot own his person: there is therefore no Consideration for the Executors liability. Judge Dean conceives the bond to be an entire bond & void as to Mr. Pond's purposes. If the Executor is liable the trust is transmitted, if the Executor is not liable, the trust must be void.

In England a presumption of fraud

Court

Master and Servant

Sach. 67 on taking the Apprentices, and hence if the Master obtain his premium he ought to furnish necessaries =

Dom. 553 Vent. 350 Fitz. 285 2 Brown. 467 1 Ld. Raym. 452 Clancy has interfered, and ordered that a part of the premium should be restored = In one case they ordered a larger sum than the attorney was to be restored = If the Apprentice is turned away by the Master, Clancy will order a part of the premium to be returned = It is Reason, that in the Master becoming a Bankrupt which dissolves the relation, a part of the premium will be restored or rather allowed. Yet the Bankrupt is not per se a discharge. The Court of Session, will discharge in case of Bankruptcy, if the Apprentice required it, and then the relation is dissolved = In England Justices, who have a right to discharge may order the Master to refund a part of the premium = Matters of Reason.

2 Vern 64

2 Atk. 109 3 Bac. 550 Stiff 502

1 Bl. 6. 429 2 Rand. 260 Sach. 67 429

tion.

earns by his labour during the 2 years
he stays belongs absolutely to the master
and this is the rule where the apprentice
is only by parol or implied by
law. Contract. Whether any thing
the apprentice by means of the apprenticeship may be procured by
the master in his own name in any
proper action — This is a body corporate
though the apprentice's salary without
his master consent and out of the line
of his master's business — This paid last
stated may not be laid to any other servants
except apprentices — Where the master
can not recover the servant's wages this
proper remedy is an action on the case
for loss of service — So if it is said to the
prior servant if they visit their master
in business and serve it so the master
can not recover the wages yet he may re-
cover in against the servant & if any
action against the Guardian of the

Stra. f. 38
Salk. 68
12 Mod. 415
6 Mod. 69
1 Ves. Sr. 8.

Ld Raym
Stra. 38
1 Salk. 68
2 Wils. 348
5 Ch. 48

1 Bac. Ab. 117
Co. Lac. 653
2 Bac. 63
3 Bac. 567

Guardian

Master and Servant

3 Bac. Abr. 581

Employer sues of the servant to obtain damages against him for breach of Covenant

If an Apprentice or any Servant by unlawful absence from his Master's Service commit actions lies against the actions: and a Journeyman is a Servant within this rule = As to the forms of the Actions in this case the two distinctions is of taken by Lord Coke, & Holt & others as to the case will lie

Cro. Eliz. 55 cont'd
2 Bac. Abr. 581
or 11. 17
Salk. 380
5 Mod. 367
Bac. 188.
2 Keb. 167.
2 Bac. 1032

In England an Apprentice gains a settlement in the place where he served the last forty days of his Apprenticeship: this by Statute

In Connecticut an Apprentice gains no settlement by residence with his Master but by

It is also provided in Connecticut that an Apprentice or other servant of the age of fifteen years or more who ab-

sconds

Master and Servant

are to serve to the time of limitation 5 & 6 E.
when the original term is expired: and it
is also further provided that under a ge-
neral warrant, a man may be un-
lawfully to retake him, or if necessary that
may be taken to procure him.

VIII. Menial Servants.

These are Exceptions from 4 Geo. III.
giving extra powers. c. 34. s. 25.

The rule as to these Servants, in England
is, if the period of the service is not fixed 2 Bac. 546
the hiring is for one year: on the prin-
ciple that one shall serve and the other
maintain through the second Season.
This is not the rule in Connecticut
that is it is not practised in the Court
By the Statute 5 Elizabeth a Master
does not discharge the Servant leave
by Master without three months no-
tice, unless by dismission.

IX. Day Laborers.

Also is a result of the Common

Law.

Master and Servant

applicable exclusively to this Class of Servants. But by Statutes 7th & 8th Geo. 4th & 5th Wm. 4th it is provided that all persons having any visible effects may be compelled to labour and the justices of the Sessions may by their Warrant cause any such persons using any Calling not more than the aforesaid Penalty is liable to a Penalty

V. Servants of this Class are Agents of various Kinds, including Factors & Stock Keepers. Stewards Class (5.)

The Difference between a Factor and a Broker is that the former is a foreign Agent. These are not Servants by Apprenticeship and Married Servants but only as affects the Authority of their Employers. The Master has not the same general control over the person of the Servant. This Employer is usually called the Principal. Up to the Right and Duties of this Class of

(5) C. 426. 427

(5) C. 427 Chan. 423 Chitty 2 vol. 297. 298

Servants

Master and Servant

servants and their employers, it is difficult to lay down any general rules. They are always bound to act for their Master according to his directions. The Agent ought strictly to pursue their Commission both for their own security and the rights they owe to their Master.

Whenever an Agent pursues his instructions he is not liable for casual errors, even if he may not pursue his Commission.

A Factor may retain goods in his hands to satisfy a balance in his favour and not only a particular but a general balance. A particular balance is one due for Agency on particular Articles. By all the Articles on board a Ship. A general balance is one due for Agency on all the goods that have come to the Factors hands in the course of his business, during the continuance of the Agency. The business of a Factor is to buy and sell and his principle profit

Principal and Factor

is in selling for his commission and Salary.
Lien 251 His lien is gone by surrendering the goods
Bac. Abr. 625 to the Principal. A lien is an implied
1 Roll. 4 pledge to the owner or a specific in-
2 Park. 337 cumbrance. When a Factor sells goods
2 Bl R 1154 he has the same lien upon the price
of the goods in the hands of the purcha-
ser, as on the remaining goods and he
may direct the purchaser to pay the
money to him and not to the principle:
and then if the purchaser notwithstand-
Lien 251 ing such direction pay the money
to the principal, he is liable to pay it
to the Agent also. Whether a Factor
can sell on Credit when his Commis-
sion is general to sell "buy and sell for
ready money" is a disputed point: he may
be trusted by his principal and himself
be so believed himself and the purcha-
ser be incumbered can. If he does sell
Salkeld 442 on credit he must act with prudence
Ld Raym 182 Str 1251 if he is imbezzled and the Factor becomes

a

Master and Servant.

= Bankruptcy the Factor himself, & all= Courts of Equity will sometimes, though not frequently, interpose in Bankruptcy concerns - If the principal suspects the Factor to be in failing circumstances, & tells or the Bankers not to pay the money to him, but to himself or the Principal, and the purchaser nevertheless pays it to the Factor he must be liable to pay it to the principal = But a Factor it is said has no lien and the goods of his Principal which they come to his actual possession: - A constructive possession is not sufficient to give or create a lien - A Constructive possession is a general right of possession, as contradistinguished from actual possession for as to the lien the goods are considered as a pledge and a pledge to the Lender of the Factor is of no value =

Where the authority given to a Factor is discretionary he may execute or transfer that

3 T.R. 119. 1 Esp. 134. 2 Bos. & Pul. 417

3.0.V.

Master and Servant

that servant can not be liable for an act of his. But if he has no discretionary power, and then varies from the Principal the principal may disclaim the Bargain & is liable as the Factor as if he buys off a size more than his Servant was to buy.

Com. 552. 2 B. & P. 298. (If he buys more the principal may disclaim the whole: if he sells for less the principal may recover the difference he may do though the factor shew that he acted reasonably: A Factor has no right to pawn the goods of his principal: if he does so at the time of his buying. If he does pawn the principal may redeem and the goods of his pawnee, and if there is a balance due to him in rendering the balance due to the factor may maintain an action of Trover for the goods.

5 T.R. 364 8 East 348. Bac. Abr. Sale L. 8 4 Bl. R. 389.

(If he may do even though the pawnee does not know that the Factor acts in a Representative capacity.

A Broker or Merchant is one who lives by buying and selling goods.

Master over Servant

A Factor who sells and may have an action against the Vendee in his own name = We see a Factor is a foreign Agent and as a great deal of his Imp is done by Agents, a Man must be on his guard. A Factor usually sells in his own name and his principals not knowing nor does the Law require that he should be made known:

The Auctioneer who is not a Factor may sue in his own name for goods sold by him; and though the buyer know that he acted as Agent. An Auctioneer is not liable for selling goods to the highest Bidder the reason is that he and not getting up goods at Auctions is an established Contract, that the highest Bidders shall have the goods = If however the principal did not desire to sell the goods at a low Price, given to the first instance, and he knew will for it he is liable.

The Attorney has a lien on the Goods and

3 Bl. Com. 382
Bac. Ab. 956
1 Bl. H. 354
Bul. N. P. 130

1 Bl. R. 8.
3 Doug.

Bank 3 T.

Master and Servant

1 Roll. Ab. 88
pl. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41,

On the one principle the partner
can not bind the other by Deed except
authorized by Deed — But this rule
must not be confounded with another
one which is clear viz. Where a Servant
present direct another to sign his name
to an Instrument — An Agent for the
Public contracting by Deed, is not
personally liable in his Contract, in that
capacity: as for instance a Commissary
General. This question was decided in
the United States Court in the case of
Porter — An Attorney is bound for
misfeasance to his Employer, if his Client
sustains a loss by it — If he goes off
a fishing & the Letter ordered he might be
from abroad Court — Then he principle
which of Common Law every Attorney
must possess his power. His business
is confined to Connecticut —
If an Attorney is once retained he can
not refuse to proceed and manage the
case

1 Bay 172
Dall 64
Peters 180
1 Root 89

Dallas 3
cases 3

Pick 3 Esp

1 Root 271

5 Co. Rep. 28. 12 Eliz. 9

The may refuse to manage it in a particular manner but he can not decide it arbitrarily at his own: & in such as with regard to the Client: the may refuse the Attorney whenever he pleases. There is no proceeding in this but in Law: the Attorney can not release the damages at Common Law: it is done however in Equity: Attorneys

Cases in the time of K. Elizabeth 257

may be committed for a contempt of Court: what amounts to contempt is for the Court to determine.

If an Attorney agree with his Client to receive one half of the Land in dispute if he get the same but if he should fail to receive nothing he is guilty of the crime of "Champarty" and is punished accordingly: This is practised in some of the States, but is highly dishonorable: An Action of Slander may be brought by an Attorney against any one who calls him a "Champertor"

4 Bac. Ab. 2 Inst. 564 Salk. 599 1 Bl. C. 135

Master and Servant

If an Attorney tells his Client that there is no possibility of maintaining his action, and the Client invites him having it tried, which is done accordingly, but he loses it, he can maintain no action against his Attorney for it on the other hand the Attorney draws a bad writ by which means the Client loses his Attachment the Attorney is liable

VI. This Class of Servants, consists of Debtors assigned in Service. Such Servants are unknown to the Common Law. But by a Statute in Connecticut a Debtor committed on Execution, and having no property, may be assigned in Service to the Creditor, if the Superiour or County Court thinks proper and the Creditor desires it. The Debt must be bona fide. This is a Species of Apprenticeship, though the person assigned is not an Infant

3 Lecture

Servitude

Master and Servant

The Court will estimate the [illegible] of the service and the time of the [illegible] it is such as to entitle the Servant to pay at the fixed rate. This [illegible] may [illegible] The Court will [illegible] endeavour to show that such a [illegible] would be unreasonable under circumstances. They will consider his health character Domestic relations and the claims which other persons have. In general the Court will not object an apprentice who has a family to support as one who is much the better for the assignment when made can never be to a man and his family or to a man and his property. These are also [illegible] 35 rules. The assignment must be strictly personal. There are some rules which [illegible] to Masters and Servants generally to know the Master is bound by the acts of his Servant, and what he can [illegible] and what he cannot.

[illegible]

Master and Servant

rule is that those acts of the Servant which are done by the Master's command either express or implied are in the contemplation of the Law the acts of the Master himself — Regularly all acts done by the Servant in the employment of the Master are deemed to have been done by the Master's command — for qui facit per alium facit per se — To be more particular there be 3 general classes of acts which include all:

1st. Whatever the Servant may by the express command of his Master:

2. Whatever the Master expressly permits the Servant to do in the course of his ordinary employ —

3. Whatever the Servant may within the Scope of his general authority those are all deemed to be the Master's Acts: A Contract made with a Servant as such has by implication from the Master to make it is deemed

4 Burr. 2074
1 Bl. C. 429
2 H. & W. 412

to

Master and Servant

be the act of the Master = Suppose a employs B to make a Contract for him in his name, or suppose he hires him to buy a Horse or suppose he is usual ly employed in act for the Master, as a Clerk to a Store. All such acts are done by the Master and, the action must be brought in the name of the Master = it would be unlawful like to allege that they were done by the Servant for the Master.

3 Bac. 337.

In fac. 293. Mod. 298.

If a Servant embezzles his Masters money in his Masters house or without the Masters house, the Master may prosecute and recover the same, as if the Servant had been practised on himself. If a Servant is robbed of his Masters goods in the absence of his Master he the Servant may have an action against the Thief under the Statute of Winton of Hue and Cry = It is said the Servant may bring an action on the grand of liability over to the Master. they

Servant

Master and Servant

Trover is not maintainable by the Master against a stranger for the Servant's wearing apparel, which is delivered to him by the Master to be worn in his service, and for the use of which he is to account to the Master.

Master and Servant

gaining from the Servant by wrongful
& illegal Contract the Master may recover
it as if it had been taken & held from him by
any illegal Contract: & if the Ser-
vant by guarding his Master's property
3 Bac. 559. 2 Bl. 70 there being no fraud or illegality prac-
tised upon him and the receiver not
knowing it was his Master's he shall
hold it: according to the Maxim that
one of two innocent persons must suf-
fer by the wrongful acts of a third, he shall
suffer who confided the other to do the
wrong. If one Innkeeper's Servant rob
2 Roll. Ab. 552. 2 Roke 32. 2 Jac. 268. his Master's guest the Master is liable:
& if the Servant (send) any rubbish by which
1 Roke 95. he keeps the Innkeeper is liable

But it is held that the Servant is not liable
3 Bac. 559. 3 Co. 30. 1 Roke 95 even though he knows the Property to be
stolen: because he acted by the com-
mand of his Master: This rule appears
to some Men to be very questionable
but it is said the rule is better than any
reason

cause a pique against it. though he thinks it very questionable, indeed that it is incorrect – Suppose a Servant should knowingly give Arsenic to a Guest clearly he ought to be punished and if he is liable for the Injury – A Servant is bound only to do such commands of the Master as are lawful and honest

3 Bac 565
1 B.C. 430
Ry. 29 358
556.

If a Servant does an unlawful Act by the command of his Superior a Master both are liable. But it is said if the Servant does an unlawful act of which he is ignorant in obedience to the command of his Master the Servant is not liable: So if the Master confine Servant and then order his Servant to cook the Food the Servant acts in this case is not unlawfull – Suppose the Act commanded to be done is in itself unlawful & accompanied with fraud here the Servant is liable of course &

3 Bac 565

Wills 528 – 515.

Master and Servant

E.g. a command to cut down a given tree - The Law of Trespass does not regard the intention - If a man command his Servant to an Act which amounts to an offence he is liable to either for all the consequences -

2 Ex. 595

These Acts not done by the command of the Master either express or implied are not regularly owned the act of the Master - When therefore a Servant acts without direction from his Master and not in discharge of the Masters business either generally or specially entrusted to him, the Master is not liable - If how under these circumstances, the Servant enter into a Contract for the Master, the Master is not bound by it E.g. suppose a Servant employed in the fields leaves his business and commits a battery the Master is not liable - But where there is no express command there can

6. Lecture

be no implied one, unless the act is done in discharge of the Masters business - Upon the same principle, if a Servant make a Contract without any authority or injures another at a time when he is not employed in his Masters business or service the Master is not liable - If the Servant make a Contract without any authority from the Master and the Master afterwards agrees to it he is then liable - It was lately decided that if a Servant actually in his Masters employment should wilfully do an injury to a person the Master is not liable: E.g. a Servant driving his Masters carriage against that of another person wilfully and breaks it this act is not done in furtherance of his Masters business and the Master is not liable - The reason why the Master is not liable in this case is that

3 Salk. 282
1 Bl. R. 451
8 T.R. f. 533
Shiv. 228
3 Burr. 562

Parl. 136
2 Roll. Ab. 552
1 Brownl. 64
Cyc. L. 42
Comyns. 405
1 Wood. 485
contra
2 Wils. f. 341
Q. 3 Dicta
482

Master and Servant

like the rest is not done in furtherance of his Masters business - Formerly it was a law so granted that the Master was liable: and it was first decided in East that the wilful act of the Servant was his own act - It is well settled that if a Servant through want of skill or by negligence, and in his Masters business can maim or injure a third person his Master is liable - The Court said it never was affirmed whether the wilful act was done in driving a Carriage or throwing a stone for which he was employed his Masters business -

a Peake 161 - 4 Esp. 212
b 2 Roll Rep 135.
5 T.R. p. 648.
1 B.C. 481
2 C.B. 461
2 Bing. 439
1 Brod 485
4 Bac 562

The Master must at his peril employ faithful and skilful Servants as respects the persons but the Master is not bound to answer against the unruly passions of his Servants - A Surgeon apprehended injuries the consequence of a patient through negligence or want of skill and the Master is not liable with

d Peake 189 or 193

Master and Servant

3 1/2 P.

In case a Blacksmith's boy injured a horse in shoeing him, the Master is not liable. 1 B & C. 431

The distinction between wilful and negligent injury has been lately well understood. The first case was that of a Servant wilfully driving a carriage against another, and the decision was made only to the action, that it should have been trespass instead of an action on the case because the injury was immediate. Hence the position was correct. But the reason given in the case 6 Term Reports 136 page was incorrect. The next case was an action of Trespass, brought for a negligent injury, and the Court said it should have been an action on the case. 2 T.R. 414

The same the last case. the circumstances as above, and the Court held that an action would lie against the Master for the wilful acts of the Servant. 1 Esp. 106 Salk. 441 1 Bac. Abr. Title Master 478

Master and Servant

Three division are all correct and on the first and third Case against the Plaintiff. Whenever the Master is liable for a forcible injury done with out his direction the proper action is on the case and not Trespass

If the action is brought against the Servant this is the proper action and not on the case: and when it is said that the act of the Servant is the act of the Master it is only Constructive.

The doctrine of Respondeat inquitation is only a fiction of law framed entirely for an to make him guilty:

If a Servant employ another in his Master's business which latter through negligence injures a third person the Master is liable also the Servant to all the intermediate Servants:

(Com Dig Vol 4 [illegible])

This rule has lately been carried so far as to extend to third and fourth Servants Judge Acton however thinks the rule

a questionable one, & perhaps for the day though - & may be willing to employ & yet he may not be.

It seems in this case that the action will not lie against the intermediate Servant but against the one who employs the second Servant, & against the Master - When the wilful act of the Servant amounts to a violation of a Contract between the Master and the party injured the Master is liable, and the ground of liability of Contract and where he is not liable there is no privity of Contract - Judge Reeve states the reason this to be true in principle that he may not find it so in the books - If the Servant of the Master wantonly or causes a fire in shooting here the Master is liable on the ground of Contract for where one undertakes to do a thing for another it is his duty to Negligently to use all necessary care and skill. In a Carlin

6 Johns 5 Taunton 108 Jones on Bailments 95 30 N.H. 130

Master and Servant

Tailor who spoils a Garment by his Apprentice &c

From the analogy of Master and Servant there have been two attempts made in England to subject the Post Master: but it is settled that he is not liable for the Acts of his Servants (i.e. his Deputies) He is a Servant and receives no hire from the individuals but from the public. The State is the employer: he is the Agent or Servant of the State: he is an intermediate Servant and on that ground is not liable. The same rule as to Deputy Post Masters: But a Post Master is liable for his own Actual Faults: and so of all subordinate Servants: each one is answerable for his own Act and Default.

The Post Master is liable for any negligence practised in his Office, as if he take illegal fees: An action of Assumpsit will lie to recover a Gratuity

1 Lecture

Salk. 17. 2 Ray. 646. Carth. 467 Comb. 354

Ld. Raym. 878 Comyns 465 2 Str. 906 3 Wils. 433

Ld.

had and received. Illegal bargains Comp. 182.
those which are greater than the Law
allows. We will now consider
the liability of Masters on the Con-
tracts of their Servants.

The Master is bound by the Contracts Comb. 458
of his Servants when they act within 1 Roy. 904
the Scope of the authority delegated 2 Salk. 442
to them by the Master. 1 Bl. 6. 457
2 Burr. 545
6 " 3
Any Authority so delegated may be 5 T. Rep. 557
either express or implied — general or 8 T. Rep. 531
special. A general authority to
contract is one not confined to any
individual contract but which ex-
tends to all Contracts in general or to all
Contracts of a certain kind. As
a Steward who contracts for all
articles for the family: So a Clerk in
a Shop has a general authority to con-
tract. A Special Authority is
confined to one or more individual
transactions. Thus a Carrier & his

Clerk

Master and Servant

[illegible] done in such a [illegible]
But this authority will not [illegible] personal
obedience and [illegible] to [illegible]
[illegible]. The [illegible] authority is [illegible]
used in order to [illegible] a personal
authority would be implied where a doctor
[illegible] a wound a [illegible] servant
[illegible] to treat his servant in the same
[illegible] [illegible] authority may be
[illegible] though it [illegible] [illegible]
[illegible] when the servant contracts in
the master knows the [illegible] know
[illegible] what is transacted without [illegible]
[illegible] [illegible] implies [illegible]
the servant [illegible] [illegible]
[illegible] [illegible]
If a master [illegible] [illegible]
by his servant and has not [illegible]
[illegible] to trade in any [illegible]
[illegible] to such trade [illegible]
[illegible] [illegible]
[illegible] [illegible] by the master
[illegible] [illegible] [illegible]

Servant

Master over servant

Servant's Decay of the Master in a Publick Court or Crown frequently set the Master out an Action and Debt. this gives him a credit and Master and Servant Thus = This general imbibed & Clearly every Private Letter to raise Discourse as to the Publick as to Par- ticulars or Corporations. And if a Servant without any Order Commit Fornication 3 Salk 284 Ld Raym 650 5 Rep 13 Cro Eliz 815 Hob 179 Bro Abr 68 for the Master which afterwards comes to his use he is liable for all no Grievance by Fraud and Deceit of the Master ground by having of Trade. Thus in one case not settled in the Books, Ref. where the Master Sends Money by the Servant to Purchase Goods Some to Purchase for the Goods and Some Servant Robbing the Money and Goods come to the Master now he pretends Time to be Sworn or Obtained Some Quere that the Master in this Case is not liable Some the Money Robbed or Lost

Time

Master and Servant

in a close principle. The liability of the Master when the goods are lost by a Servant depends on the assertion of extraordinary but there is no liability for the default of the goods are lost by

An illegal Instrument a person may bind himself by a lawful contract to any contract unless the Nature of the transaction. The seller is guilty of no fault for the Master may grant Power to create and has been guilty of no neglect

Ld Hardwicke a Master has a void authority to his Servant to contract for him on trust yet he may exercise this Authority: he cannot notify his prohibition to private agency will have no effect: non modus tollit a dispensation of this relation determinable at the Authority. The Authority of the Servant must be as general as the authority & credit and the power exercised by him cannot be public:

Lister
Dr. 27
2 Wils. 325.
Bacon Ab.
Master &c
(N)
12 mod 346.

Master and Servant

If a Servant in making a Sale under Control of Sale make a warranty as to the quality of the property the Master is bound unless there was an express prohibition on the part of the Servant not to warrant (2) the Servant has to warrant if procured unless the contrary appears — (3) as when the Servant acts within the scope of a general authority some express restriction not made known to the purchaser to the public could put an the master liability on the Servant warranty &c.

P. 2. A Servant warrants a thing to be sound when he is not: the Master is bound by the warranty — tho' given the Servant without authority to sell and if not restricted the Master is bound by the Warranty — If a Servant employed on a Country Station writes a warranty letter it is to make the Master answerable and warrant them the Master

4 T.R. [illegible]
3 Do 750
Salk 289
8 Taunt 595
653
1 Esp. C. 11
10 Mass. 109
Dyer 60 pl. 420

3 T.R. 760
761
10 Mass. 109

Master and Servant

would be liable, i.e. he would be bound by this warranty even though he could [illegible] forbidden in a particular instance. What difference does this subject matter make between the Master and Servant in the case of particular contracts, between the Servant and the public? Quaere. But in case of [illegible] contracts and this restricted and warranty the Master has given his Servant no credit and the Servant has bought at his peril. He indeed obtains the right of the purchase. The leading case on the subject is in the Marginal Authorities. The Lessee seems to be of questionable authority. Though it was not thereby denied yet the Judge thereto it is not reconcilable to such a modern decision.

Cro. Jac. 189
2 Ryl. 3

There is another case laid down in the Book which Judge Coven thinks not [illegible] reconcilable [illegible] these two

Quaere

from the Party on command he is able a
lure by paid the Master is not liable in
less he direct the Servant to sell to a
particular person. The Judge says he
does no recollect for this rule among
the in the for pay the real difference
now I make in the servants selling
to a particular person & selling the
Principal afloat as putting a fraud on
an individual & on the Public.

If a Servant selling as Clerk sells
goods on a warranty that is to be good
the Master is liable even though he
actually paid him for the Particulars
is private and the credit Public

The Servant himself is regularly not
liable for the Contracts which he makes
for the Master but he may render
himself by contracting in his own name
and on his own personality even tho
in his Masters employ. If the Servant
make a warranty in his own name he

i

Abbott 95
2 Phillips 5
2 Bac. Abr. 595
3 Bac Abr 590

2 Kelly 285
3 Campbell 5
5 Taunton 282
289
4 Campbell 144
5 Bingham 555

2 Selwyn

3 Bac. Abr. 595
2 Roberts 2nd 670
Abbott 95

(Master and Servant)

is bound by it - one man cannot by
1 Sm 2128 2 Sm 129 of the Servant as his Master service
in the a Contract without his Master
authority the Servant is personally
liable and not the Master -
- So one wife cannot by matter and
render his Authority as well as in his
2 Bl 443 case of his Servant - Thus a man
wife or Child may be a Servant for
the purpose of making a Contract bind
the Husband or Father - The Statute
Law of Connecticut, Appendix Statutes
3 Day 294 and forms under the government of
a Servant, Guardian or Master, when
provided by either of the three last
mentioned Characters to contract for
him only in his own behalf may bind
either of them - Herein it differs from
the Common Law - This Statute is
general yet none was intended to in-
clude the Servants but only Minor
Servants and Slaves which Statute
was

Master and Servant

and Menial Servants and under age and Slaves.

We will now consider how far the Servant is liable for his own acts and default to his Master and to Strangers

The great general principle is that the acts done by the Servant by virtue of the Master authority, and the Masters acts - Generally the acts done by the Servant without the command of the Master unless ratified or adopted are not the acts of the Master but the Servant is personally liable. In general the Master is not liable for the wilful acts of the Servant but the Servant is himself liable. Trespass not the Masters acts - There acts are an independant act of the Servant as if throwing a Stone or doing an injury there are several cases in which Strangers injured by the acts of the Servant may have their remedy against either the

Skin. 228. 8 Bac. 596 1 Bl. 6 421

Sid. 378 Ld. Raym. 1095 3 Bl. 6. 433 6 Mod. 1095

the

Master and Servant

the Master or his wife: and the Jury
found Verdict accordingly for the Defendant in Consideration of his Majesty
Cro. Car. 685. having been injured by another through
Hardy 288. negligence, ignorance or want of Skill,
4th. Rep. 20. b. 7th. f. 411 both Master and Servant are liable:
" 125. the transaction in which the Servant
Ep. 2d. 580 " 586 was engaged does not amount to a
violation of a Contract between the
Master and the party injured: E.g.
if Servant through negligence drives
his Masters Carriage against another
if this case the Servant is liable: The
point is the same if through ignorance
or want of Skill — But the transac-
Salk. 284 tion in which the Servant is engaged
6 Mod. 26
Comb. 406 at the time when he thus commits
1 Str. 480 the injury is founded on a violation
of a Contract either on express or implied
the Master against
Abbott C. J. Ellenborough Judge
Abbott says he does not find this negative
Rule in the Books, yet he thinks it
must be so for example to the Case

Rule

Master and Servant

Slade 1 Ld Raym 574
Cro Eliz 38
Yelv 159
Cro Jac 38
2 Roll Abr 553
Dane Abr Supp

Master and Servant. In Blackamby & Bunce v Hoyle in Sherwin Assw. here the Master sues by Action upon the Case for Loss of the Service of his Servant by the very Act and Deed of the Defendant, who procured him to depart from the Service of the Master, and to go into Foreign Parts, whereby the Master of a Ship is liable to his Freighters for any Damage occasioned by the Negligence of his Men as well as to the Owners though the Contract is made by the Owners. Several Actions and Assumpsit and Assumpsit Policy seem to require that the Master of a Ship should be liable because the Freighters may not know the Owners and the Contract is generally made with the Master. If Masters the Owners may be as a Foreign Country and by Consent of the Contract.

For the other Hand if a Servant commit a wilful Act he is always liable even tho the Transaction was amount to a Violation of a Contract in that not a Tort

Master and Servant

1 Esp 116 If the Servant himself incur damage by the Master's Default. E.S. When the Defendant's Attorney, a Party in the Cause

Pothier Obl. 191 The Action of Mandatary against his Employer for money laid out and received will not lie against any Officer of the Revenue for an Attorney employed for the Crown: But will against him any Public Officer for money retained by him but not for himself he is not a Servant

Esp. 116 If an Attorney bring an Action against one when he knows that the Cause of Action has been released he is acquitted, but if it is not known to him to determine whether he should have a Crime Action or not. Demurrer accepts, but the Court must decide whether he will bring his Action or not. The case supposes a Judgment in the Plaintiff's favour the Attorney in the Plaintiff's Action after a Judgment against

against

Butt. 95
Bl. Dig. 48.

Therefore action of trespass against the Defendant and his associates to sue liable to an action at the suit of the party aggrieved

The Servant in many cases is liable to the Master.

Thus the Servant is regularly liable to his Master for all wilful wrong and all negligent of his duties for all violations of his duty. So where a Merchants Servant sold Linnen cloth by which the Duties were paid and they in consequence were defrauded here the Servant was liable to the Master. But no action will be against a Servant for a mere breach of duty where no damage have been sustained or for any indolence or ill manners - there are more cases of chastisement - But if a Servant neglect to perform or wrongfully put command of his Master whereby the Master sustains an injury action lies

3 Bac 364
1 Mod. 106

2 Bac Abr
10 Mod. 99

15 Dig. 98
3 Bac 364

1 Bac 388
Dig. 98
Mod 108
9 Mod 6

Master and Servant

Master and Servant – The rule is the same where there is no express agreement as to the time of service and an express command. If Master to servant negligent his Client, servant

This general rule is to be observed, that whatever a Servant regularly undertakes to do, he engages by implication of Law to do with fidelity and diligence. Consequently, he is liable for gross neglect only as habitual for want of diligence and fidelity, and not gross or slight neglect for want of skill or strength. Whatever one undertakes to do for another in the line of his profession and remuneration, he impliedly engages to perform with all necessary skill. As to every thing that the Servant is not regularly liable to expect of good, by reason of belonging to the Master. This protection covers family of Master except in case of the servant himself or his property voluntarily to Master's care in the

Master and Servant

liable to the Master? Generally there the Servant is not liable for the very acceptance of the duty against which indemnity & prudence are no protection & generally contributory but is not liable for inevitable accidents - The Servant is no general Bailee and to the Master when the latter has been obliged to pay damages done by the Servant P.D. when the injury was occasioned by the misconduct or negligence of the Servant -

But it is said that the Servant is liable and to the Master if it is not meant to ability to carry into the Master's and a deal Party - In this case both and that for any and the making of policy ability

Of the Master's Authority over the Servant

This is extended by the Law & right to a Master over his Servant for any breach of duty or neglect of his under and all remedy & this the same right to against Servants as he has against Strangers for the breach

of suppressing domestic government.

2 Mod. 67.
2 Mod. 120
3 Bac. 56

But the correction to be justifiable must be reasonable. The general rule obtains between a School Master and his Scholar. But this general rule does not apply to new Circumstances. There is no reason for extending that the Scholar and Master are included in this Rule. In the Case of Penny Lodge Bean it is held that the Master has a right to correct them and so had any other Person. Indeed the Judge attributed, that the Scholar only to mean the Servants or such as are under the personal control of Others.

Domestic Servants in Apprentices and Journeymen Better, stand in Nearer Relation to their Masters than a Scholar might be expected to be Parliament were present.

But if a Servant or other Servants shall Steal or embezzle his Master's Goods they cannot upon the general Reason

turn

The Master Battery of Servant

to stand or be by the Master or the House of the Master: The correction must be reasonable Since the Master can not be justified in wounding his Servant

By wounding a servant must a Master or Owner, or employer a stranger, 3 Mod. 37
3 Mod 120,
331. 218.
answer to a Master of his Servant by pleading the relation between them. Since by a Statute in England a Master may plead battery not guilty as to the battery and a justifica- 3 Bac. 357
tion as to the Master or Mistress Retinant When the Master is sued and wounded justify the battery and wounding as on the ground of Relation he must state the relation of the Servant & wound from the first retainer and the original by which the Servant was retained: Since that the battery are 1 Bac. 479
1 Bac. 353
all reasonable and he must plead not 2 Bac. 45 a
Lil. Ab. 3. 606
Co. Litt. 300
Sid. 99. 4
guilty to the wounding - This is it of 2 Mod. 67
5 Bac. 5 &c.
a Retainment strictly personal and

and

Master and Servant.

not be transferred or delegated to third
persons. A fiduciary of the Master to exercise
1 Bac. Ab. 454
1 Ld. Raym. 443
1 Brook. N.P. 5 mod. 287
Hob. p. 55
them, the Servant not being to take him
he is guilty of excusable homicide: Man
Slaughter & Murder accordingly to the
circumstances of the case.

It is a rule that a Servant could not
1 Ld. Ch. 5 Geo. 2.
avail a Deed obtained from him by
duress of his Master, or to have saved the
estate of his Master.

If the Master brings an action against third
persons for injuries done to him in that
respect
is related to his Servant.

In general a man has a right to recover
of any third person who entices away
his Servant a Servant. The action
must be laid with a per quod Servitium amisit. Some of our writers
1 Mod. 86.
3 Lev. 37.
5 Co. 19 b.
Cro. Eliz. 781.
Yelv. 89.
Hard. 149.
as above the Servant of another he
then has an Action on the case which
must be laid with a per quod &c. This is
the first of the Action

Master and Servant.

If one's Servant is forcibly taken away by trespass with a per quod servitium amisit it is the proper action for the master: and the injury must be shewn. If there is no loss the action is an action on the case. One of a Servant without notice must leave his Masters for one unjustly and is retained by one who knows of the former retainer and action lies against the latter for loss of Service. Secus if he be ignorant of the former retainer. One indictment will not lie against one for enticing away another's Servant: it is only a private injury.

If a Servant is beaten by another he only can maintain an action for the battery. But if a loss of Service is occasioned by it the Master may recover for the consequential damages sustained. The Servant is injured in his person and the master in the loss of Service. The two injuries are right to

1 Roy. 152
" 117
Salk. 380
3 Salk. 91
2 Ld. Raym. 87

1 Lev. 43
1 Sid. 10
" 136

1 Salk. 380
3 Salk. 90
Str. 115

1 Cro. 75
1 Ld. Raym. 12
3 Salk. 90
Str. 775

Master and Servant

Lawes v Knott a recovery by Lessee is no bar to a recovery by the other

But in the case put mentioned the Lessee by must declare with a per quod per Lawes principle "per quod" is the gist of the action and without it the declaration is demurrable = A Master whose is a Servant of another may retain the latter and an Action may be brought if a Master or Guardian bring an action for the battery committed on the Child the "per quod" is the gist of the action though not the only rule for damages

The relation is never granted on the relations of Parent and Child, but on the ground of the relation of Master and Servant for not the relation of Parent and Child is the principle rule of damages & it necessary to make out some loss of Service = But if a Stranger beat the Servant of another it is not so that in this the Master has no private satisfaction

Master and Servant

or remedy for the public that the Injury is injurious to the public Interest. According to the Law & Constitution means of satisfaction and ease the property of the Kingdom is so protected & secured that there is no Danger of a Surgeon employed & cured a Servant wrongfully injured it as that the Master may have an action to recover this loss. Judge Buller says he finds no rule in the Books, whether an action will lie for the injury done through negligence or want of skill, though he is inclined to think that no action will lie in such case. No doubt but the Servant may maintain an action for the injury. The general rule is, that he who does an unlawful act, is liable for all the consequences resulting from it. So the loss of a Servant enticed away or of one who leaves his Master without enticement and

Cro Eliz 906
Yelv 67
Hob 134
2 Roll Rep 390
Cro Jac 538

1 Bac Ab 4
2 Bulst 332
3 Bac 568

Cro Eliz 906
Yelv 67
Hob 134
2 Roll Rep 390
Cro Jac 538

3 Bac. Abr. Bail. 387. and is retained by another person who knew of the former retainer a recovery by the Master of a Judgment with full satisfaction against the Servant is a bar to an action by the Master against the retainer, for he can not have but one satisfaction — But whether the recovery of a Judgment by the Master with
3 Bac Abr but satisfaction, is a bar to an action against the retainer is not settled Judge Buller thinks the recovery of a Judgment with full satisfaction against the retainer was not bar an action against the Servant on the Contract and that a recovery of a Judgment in full satisfaction against the Servant by the Master is a bar to an action against the Contractor

What acts the Master and Servant may justify in defence of each other is next and after a third person in a Case of Assault and Battery at Common Law to

the

Master and Servant

The offence of maintenance at
Master and Servant
common law against his Servant in any
action against a Stranger, and not
to be guilty of the crime of "maintenance"
The Servant is justifiable in defending
his Master from any assault for it is
a part of his duty. He can do to the
Master whatever the Master can do in
his own defence. But a Servant can
not justify a battery in defence of his
Master's Son or any other remember of the
family, except the Wife, who perhaps he
may defend. She is not Servant to the
Husband. The right grows out of the relation. He can not justify a battery in
defence of his Masters goods this right is
personal. Whether a Master can justify a battery in defence of his Servant
is not settled. On this point there are
different opinions. The Master certainly
has an interest in the conduct of his
Servant. He is bound to keep and
Below

5 Mod 63. Salk 407 & Ld 545. 3 Bl C. 49. 2 Inst 564 Hawk P C 84 c 29 s 5.

action for loss of Service in case of a battery but they seem very precarious.

The person who commits the battery must be a Trespasser and do no necessary act to the Master. A man may justify a battery in the defence of his goods and he clearly has an interest in his Servant as much as in the goods. Judge Buller thinks the better opinion is that the Master may defend his Servant.

1 Hale P C. 484 Hawk P C. 84 c 29 s 6.

The commands of the Master will not excuse the Servant after having committed the Crime.

Executors and Administrators

Tab Above 1165

Executors and administrators are the representatives of deceased persons as to their personal estate and as to their duties which affect their personal estate.

The Exor is a representative substituted in the last will of the deceased in the place of the Exor to execute the said will.

The appointment of an Exor is essential to the existence of a will.

To make an Exor it is not necessary that the word "Executor" be used if it appear from the intention of the deceased to make such a person his Exor & appoint him to that office.

A disposition of personal property not containing the appointment of an Exor or containing a will is called a testamentary

Executors and Executrix

testament and the power in the right
Salw. 2. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40.

in Chancery or creditors & others who are
entitled to the personal effects of the de-
ceased have the jurisdiction of them
vested in cases of intestacy between
the Ecclesiastical Court and the Court of
Exchequer & the Lord Chancellor
has by law to succeed to the real estate
on the death of the intestate.

A person is a person entitled to the
personal property by the testamentary appoint-
ment of the deceased.

A person is one who is entitled to have
real property by testamentary appoint-
ment. The power of the Ecclesiastical
or personal estate is exactly the same
the debt or gift as then the creditors
are entitled to it. But real estates
they have not as they had any
power or real estate was not originally
testamentary. But they may have the
power of real estate like that person
by virtue of the intestacy of the testator.

1 Ves. 331. Bull. 235 3 Bro. 78.

2 Bl.

3 Bro. 466. Good. 74.

2 Bl. 3 Bro. 466 Good. 74.

3 Bro. 235 Lord 2. Lord 2. 8.

by of lands be vested & sold for the payment of debts the Exrs. though not strictly entrusted & sale is required in Chancery as the proper forum & the heir being thereby entrusted.

(But the estate must be such as in no case any such power & title of them vests any right to the real estate as devised to any case.

Plow. 235 2 Ro. Abr. 416 Yelv. 99 Cro. Eliz. 254.

A legatee receives the legacy through the Exrs. & devisee takes possession without the intervention of the Exrs.

The personal property is charged by law with the payment of all the debts of the deceased. (But the real is liable ~~for~~ for debts by specialty and debts of record only. At Com. Law or rather since the Statute of Westm. 2 debts or judgment debts bind real estate from the first day of the term in which judgment was rendered: and now and always from the date of the

Stat. 13 E. 1. c. 18.

of the creditors but as by the statute of
Charles II the time the Lands are
seized but 6 years provided the
proviso the king or other person entitled
signed and the party made shall
grant the delivery of the execution & the
grant according to the direction
must bound & serve on the tenant of
the lands from the time of the original
writ purchased "Thereafter" (Creditor)
may proceed to sell the real & personal
estate. And if there are upon the per-
sonal estate it be not sufficient to sa-
tisfy all the debts the "Simple Con-
tract creditors" are liable to lose all
their demands as the case may be as
not any remedy at law provided they can
not take real estate and are debarred
& specialty creditors. But in the last
case (Chancery) after satisfying the Simple
Contract creditors by letting them on
that the real estate be sold and

to

Ecc[o] and Dan[l]

the specialty creditors have taken of the personal property. And hence the distinction between the entire freedom shewn to the claims of specialty creditors and to resort of the real estate. This rule is affirmed by Chancery's retaining a sale of the real estate in the hands of the heir: and the same indulgence is extended to general legatees. If the assets of the wife are insufficient on an average is to be made of creditors in equal degree he who first obtains judgment against the executrix is entitled to his whole demand even to the exclusion of the rest. And if one of two creditors in equal degree have commenced a suit at law or brought a bill in Chancery as the rule now is the executor or executrix may defeat his claim by an instalment paying the other

If land be devised to pay debts the payment of debts by the executor shall not be construed to be a devise of land by a creditor

as Executor and not even if he obtained
probate of the Will to make sale of the Land
that not being considered as realty in
the Executor so as to pass him as
such. But Chancery will enable the
Executor to sell and give a good title to the
purchaser if the Will gives him the power
to sell and the Executor has assented to the
devise in favour of the purchaser. Effects are all such
property of the deceased as his real or
personal representative has or has the
power of compelling him to discharge
the duties which he owes or owing
to the representatives of the deceased
persons are of several kinds as. 1st Real
estate such as ought to descend and
make him liable for the debts of
the ancestor and claims upon him as
heir the real estate and 2nd Personal
estate such property of the deceased as
ought to go to the Exr or such as may be
from time to time necessary for legal
purposes. Effects are either Legal or Equitable
title

2 Vin. 530
3 Bac. Abr.

1 Ba. Ch. 29
Ca. Litt. 112
2 Mod. 102

2. Bac. Abr.

Sec. Same Form

Where a person is entitled to a
certain Bounty & warrant issued
& he wants to sell
[illegible] of the Locating of
warrant & get [illegible] he has as before remar-
ked to divide his Bounty into the
requirement of the Act & get the Assig-
nees one for each

If the Assignee wants one Lot in one
part and the Gov.t for the other part
he / he receives / &c. / of both and
has no objections from one the other
may be relieved by an Assistant Surveyor

Sec.s and Sec.ns are known by the
Contents of the Records the nearest
as can as they can get which where you
the nature of the Contract can must
be performed fairly by the Estates on
person. The Law is not known in the
Special Case of the Assigned rights
already granted but the accuracy of the
Lot Surveyor has to this report that

3 Sec. 8
[illegible] 2d
[illegible] 6 Sec.
[illegible] 2 Sec.
[illegible] 2
[illegible] 4

[illegible] 2 Sec.
[illegible] 30 Sec.

[illegible] 2 Sec.
[illegible] 2 Sec.
[illegible] 2 Sec.
[illegible] 2 Sec.
[illegible] 2 Sec.

[illegible] 2 Sec.
[illegible] 2 Sec.
[illegible] 2 Sec.

Sec.

[illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [

"Ca" "and Chan"

an action of Account" which the Lord of the soil could not have
more than a moiety of the
& could not be for debts by the Statute
Westm 2 13 Edward. The Statute gave
the writ called "Elegit" The 29th
year that Statute de Mercatoribus
was passed enabling a debt to charge the
lands by a recognizance in the na
ture of a "Statute Marchant"

The Statute of the 23rd Hen 8 gave
power to execution for debt by Statute
of the 13th which gave a "right as
to the moiety reserved" Creditors are
under the Protection of the Statute only in the
Debtors
person not in the Debtors "Estate"
for once out he is out as to the
right which they had in them and not
in their own right which they do
not themselves use But it has been
held that charging in the Debt and
Statute" is more than "Statute Marchant"
Statute

Ecc. & ors. v.

Stat. 16. and 17. Chas. 2. To this rule there is an exception where the heir by descending heir as he may be in certain cases: as for rent incurred on a lease for years after the death of the testator & in testate: for here he is charged on his possession this testator having been in debt

So, he is chargeable in the "Debet and Detinet" in case of a "Devastavit" as if he just. agt. him as Exr. of the proper testator: for he shall not be charged with a devastavit on a mere surmise. The heir must be sued in the "Debet and Detinet" because he has effects in his own right and the debt accrues with the land. Charging him however in the "Detinet" only is given by statute under the Stat. 4 and 5 Wm. & Mary & 14 Geo. II. Even tho' the heir ends aliened the property entire, by obtaining the land before letters granted. But if he aliened

9 Bac. 373.
Salk. 296.
Ld. Ray. 693.
Co. E. 711.
Mod. 345.
Co. P. 526.
41.
Co. C. 223.
1 Mod. 185.

2 Bac. 164.
Cro. 278.
1 Ld. Ray. 693.
4 Co. 32.
1 Mod. 35.

3 Bac. 29.
4 Co. 86.
Plowd. 481.
2 Ver. 399.
Salk. 199.
Show. P. C. 242.

it after the land was purchased on a bill filed in the Court of "King's Bench" the land was liable in the hands of the purchaser the Judg[t] having relation to the time of purchasing the original writ & filing a bill in the "King's Bench" & Judg[t] ag[t] the heir binds the land by retrospect. Seeg in case of a Judg[t] against the ancestor. But now by Statute 3 and 4 William and Mary the heir in case of such an alienation before action is liable as to his estate to the value of the lands sold: yet the land sold is not liable in the hands of a bona fide purchaser. In case the heir aliens after action brought & q[e] action whether the rule stands as at Com. Law

It is holden that the testator cannot give the use where he himself is not seised. Thus if A. covenants that his Exec[rs] shall stand seised to the use of B. no action will lie against the Exec[rs] for the breach

Fee and Dow.

(Formerly)

[illegible]

But now by statute 3 & 4 Wm. IV. c. 27 s. 39 & 40 & 42 & 43 & 125. 128. & 131. a devise of lands is void as against the heir and the devisee and all other persons. Now it is a question whether the devisee can be sued until the heir be joined. A devise for the payment of debts or various portions for younger children is not favored within the statute & the doing are good and the heir creditor cannot defeat them. But we have shewn that the creditor, heir [illegible] The heir of an heir is liable for the bond debt of the ancestor of the person from whom he inherits. But the heir is [illegible] 2 Bac. Ab. 15 2 Ld. Ca. Ab. 15 Fee and Dow. 4

[illegible]

to the use of [illegible] by the
first [illegible] of a [illegible]
Lands is not liable as such for the [illegible]
debts of the [illegible] executor for his [illegible]
executorship is liable only in respect of the [illegible]
he receives, not having changed [illegible] But if the
[illegible] should alien the lands & defeat creditors
[illegible] will follow the property into the
hands of the [illegible] on him.

Who may be an Executor.

All persons who may make Wills and
many others may be Executors.

Even if a child of all necessities, may be
Executor, as for example a Villein, an
infant and an infant in ventre sa
mere. If one appoint an infant in ven
tre sa mere Executor, and the mother
be delivered of two or more, they are all
Executors. An infant cannot act as Ex.
till he is of the age of 21. nor unless he
attains that age can [illegible] execute
any of the [illegible] and be [illegible]
Executor

Regulating the sale of an infant's real estate.

Regulating the sale of an infant's real estate.

Regulating the sale of an infant's real estate.

not affect the jury with the term was
if the term should be void he would be subject
to a Devastavit: & if he gave a re-
lease for more than he received it is not
binding as to the surplus. These acts
are not done according to the office and
duty of exr: for the exr is in no
case entrusted as executor till he is
of the age of 21. and therefore if a bond be
forfeited, and the infant exr release it
on receiving the principal only the re-
lease is no bar at law to an action for
the penalty. Now infant exr of the age
of 17 when sued must appear by guar-
dian like other infants & the proceed-
ings will be erroneous: for he cannot
make one attorney: the case of which
is that he has no remedy against attorney
for misbehaving & a writ is paid for no
purpose: but ag[ainst] guardian he has.
But if the exr when is an infant, one
can exr & attorney and proceedings

1. Ram 249.
1 Term 2 [illegible].
Wms. 260.
2 Ba. 278.
1 Ch. 130.

2 Ba. 778.
2. Ba. 350.
1. Ld. Ca[illegible]
Cyp 130.
Co 4. 50
41
Salem 229.
1. Mod 269

3 Bac. 152.
Cobb. 178
in C. 231.

judgment it is not erroneous for it does
in no sort avail the defendant, for
his benefit. If an infant defendant by
attorney appear & plead the error, the infant
judgt is for him. The distinction, that
validity depends on the rule, that an
infant can not act till of the age of 21 and
the reason, that he can not take that oath
first take the official oath

3 Bac. 151.
Co. Litt. 128.
Bro. Tit. 348.
1 Inst. 135.
2 Sid. 42.
2 Le Raym. 1552.
Carth. 407.
Str. 787.
1 Ventr. 132

If an infant and sui juris sue or be sued
they may both sue by attorney: for the
adult may make an attorney for the
infant. But if they be sued the infant
defendant must appear by Guardian, for an
infant defendant may be made liable
by pleading to any thing he does personis
for which he has no remedy ag^t his at-
torney, but ag^t his Guardian he has a
remedy. An infant plaintiff is not lia-
ble to costs for costs.

3 Bac. 151
Co. Ent. 318
3 Inst. 258.
3 Bac. 150.
1 Sid. 154.
1 Ventr. 132

A Feme Covert may be an Exec^x
according to the case of the Abbess of
Covent

Court of the Ord. Law the wife is considered as a person incapable of owning real estate during the life of her husband, without the express consent. But by the Civil law the wife cannot take upon herself the office of Executrix without the husband's consent, and if the Civil Law controul, the Ordinary Court will not compel her to act. Therefore if the husband dissent she cannot act and if the Ordinary Court compel her to act a Prohibition will be issued. So in the other Courts the wife cannot be necessary and she cannot be compelled to take the Executorship upon herself by the husband against her own will. But if the husband be totally administration should be granted by him, not having consented. She cannot plead "no consent." So if the wife administers without his consent and an action be brought against them they are estopped from

2 Bac. 378. Godol. 117. 1 Com. 235. Comt. Dig. 281 Esp. 2 Bac. Abr. 223.

2 Bac. 378. Comt. 223.

2 Bac. 378. 2 Vol. 117 n

2 Bac. 378. Godol. 118

[illegible]

how pleading that the marriage, &c.

If a feme sole be seised in fee and marry before the writ executed, with the estate and the husband seised to his use, such an acceptance as will bind her and the conveyance thereupon to the use, probably Baldwin's case not to have disputed.

2 Roll. Rep. 378. Godol. 170. Went. 98. 2.

So feme covert seised in fee, and [illegible] husband, a release made to will or rather a betrothment of such power as the law of equity.

1 Co. 46. 1 Bul. 108. Hob. 211.

On the contrary it is adjudged by some that the husband's consent before or after is necessary. But it seems most reasonable that the assent may enure as well to the power which the wife has as to the land and the power, namely the name of nomination to the use, so that will have the disposition of the power.

2 Roll. Rep. 400. Godb. 99. 1 Bul. 98. 99.

Cro. Car. 287. 2 Co. 57. 1 Mod. 251.

The king cannot be seised but he may be seised to other uses than [illegible] the

members

of the trad and they may be sued in
the name of the deceased.
A Corporation aggregate, can not be
an Exr because it is a body framed
for special purposes. And 2dly It cannot
take the oath to make probate of the will
For latter reason, & the ineffectual ob-
jection for a sole corporation may act
as Exr because it can take the oath.
According to the Civil and Com. laws
all felony, treason, outlawry and at-
tainder could not be creating
By the English law and treason a felon
from being the only public offences
the Civil law then outlawry and treason
attainted might be Exr because they
are in utter death. But then cannot
sue for their goods are forfeited
Persons excommunicated cannot be
Exr for they debarred from the Church
they cannot enjoy the goods of the de-
ceased no more. This is the only
reasons

Com. 6.

Com. 285.
2 Lev. 236.
2 Roc. 815.
Cart. 17. 25.
1 Ld. 9. 8.
Godol 85

Godol 80
2 Roc. 815
Cart 14.

2 Lev. 235.
Cro Eliz 628.
1 Roll 9. 7.
1 Com 64.

Com.

2 Roy. 815.
Cro Eliz 189
Godol 80

contrary under the Act 9 Geo. 4 cap. 83 sect. 56.

1 Kn. 285. 2 Kn. & J. 1 Curt. 301

Quere whether a Seaman can be compelled to do duty on board the ship after the commencement of the voyage (i.e. the distribution of stores, as well as assembling, because he holds an entire contract

Page 28. 1 Curt. 1ˢᵗ

(but it was otherwise by the Civil Law except in Military Enlistments" which are governed by the Ordinance)

2 Rac. 345. 4 Ch. Rob. 270 Lond. Jur. 681. Edw. Adm. 279.

If in a question whether an alien enemy can maintain actions in Chancery? It seems to be conceived that he may sue the effects and by the weight of authorities that he may sue.

2 Rac. 345. Gilp. 46.

Lords and Senators are incapable of being Executors for they cannot devote the trust upon their determination whether they undertake it.

1 Kn. 336. Cal. 36.

So if one Executor become Alien Administrations may be committed to another. The Ecclesiastical Court will not refuse to grant Probate to any

1 Kn. 336. Cal. 36. Sacket 293.

Executor

because he, upon one account for such debt, is already from the estate. Or one that he shall be more secure, since the estate is owing the Exr an estate will compel him like all other trustees to give security & indemnify Or where the Testr not insolvent is waiting the after Chancery will control him to give security. Or on a suggestion of insolvency in the Exr Chancery will order the debts of the deceased not to pay the Exr from next life.

1 Ld Ca. 30. 1 P.C. 29.

2 Ca. 309. Cartt. 368. 1 Rawl. 295.

2 Vern. 97. 2 Ca. 309. 2 Ch. C. 95.

2 Ca. 31. 1 Ch. C. 75.

What persons may be Administrators?

All persons who are not legally disqualified may be administrators.

A person can not act as Adm.r till the age of 21 for before that age he can not give security to the ordinary which every Adm.r must do.

Cartt. 368. 1 Vern. 248. 2 Ca. 31. 3 Rawl. 33. 3 Ca. 121. 1 Salk. 36. 1 Rawl. 295. 2 Rawl. 246.

Or

Free and Common

alienated, or in fee tail, but he may
by will devise it.

2 Bac. Abr. 324 It is a disputed point whether an estate
Sand. Uses 330 pur autre vie be devisable by will, or
Cro. Car. 592 in the case of an estate pur autre vie in the
case of freehold.

Case 85. Debts and Curates cannot be Administered

Origin of Administration

1 Lev. 158 It has been said that Administration
2 Ch. Ca. 266 in the disposition of goods of intestate
2 Bac. Abr. 377. belonged originally to the Spiritual and
Ordinary to whom both the King was
2 Bl. Com. 98 entitled by the old law to assign upon the
2 Inst. 397 grant of all intestate's estate and effects
them as parens patriæ, and general
trustee. According to Selden the care
2 Bac. Abr. 377 and disposal of the goods of intestates
2 Bac. Abr. 378 belongs to him, from the first division
of the jurisdiction of the Ecclesiastic
2 Bac. Abr. 377 in testamentary matters and most
1 Bac. Abr. 378 part of Administrations, and to have

continued

commenced in the town of Richmond
Afterwards it came to be removed the
bill, with the consent of the parties
that could be for which had been appointed
previously to have [illegible] as a trustee
also. The Richmond in exercising the
trusts & office of the [illegible] intended
in this case, to take their trust
The powers of the [illegible] are after
that of the probate of wills, it being thought
proper that the will should be proved
to the satisfaction of him who has right of
distributing the goods of the deceased in
otherwise but the [illegible] not being
accustomed to any and did not be
pleased with the [illegible] examined
after examining the patient [illegible] hours
in the time of the witness and should
agree for making the said person of the
deceased appointed in England a power to
[illegible] as a witness could be
[illegible] by the [illegible]

and administration intended my by the
If he had no wife or children, he could
by wills his whole real & personal
his own, & testators will be in spite of
his heirs. The executors were not bound to
pay over the debts of a testator: but
when a bill was exhibited the Ct. would
decree the same to pay the debts of the te-
tator & the extent of the assets.
When the law altered, the executors
right of the power of the testator to
pay or not as they thought fit.
The Court should give to the powers of the
powers may by the Stat. 21 H. 8. c. 4.
The Stat. did give the executors to pay
the debts of the testator to the
value of assets as were found before
do. The Stat. also gave executors
power over a devise to bar an affirmance of
the Court Ct. &c. when an affirmance
of such devise was made
power to the Stat. of Frauds & withdrew
&c.

[illegible]

For Private Circulation

Distribution

Wife, wife of the male except a daughter by one wife to [illegible] England [illegible] 2nd. Sal. 24 2 Bl.
[illegible] except claimant. If there be no [illegible] Scotland, wife or issue of [illegible], the [illegible] 2 Sal. 24
receiving to any appointment or native person [illegible]
[illegible], and the [illegible] appointment.
[illegible] refusal, to act or give [illegible] 1 Hyde 1 vol. 221. 2 Bu. 356. 2 Bl.
[illegible] given, [illegible] [illegible] [illegible]
But in this [illegible] the Statute, 31 [illegible] III
and 21 [illegible] III [illegible] [illegible]
[illegible] the many grant [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] 2 Bl. 375

[illegible]

pleasure, and never given the by Executors
from the usual Office of testator never enter
into it to guarantee the pecuniary legacies
being of a limited Interest of Term [illegible]
[illegible] would be entitled [illegible]
& [illegible] but the case does not differ from the
common case of intestacy -

If a pecuniary legacy where entitled to
administration [illegible] also the
rest of the case not the testator never
have the administration the Executor
Speaks only of one Trust who is entitled
legacies or residuary legatee

In the defect of all these circumstances
Ordinary never grant administration to
such persons as the testator might
have come before the Ecclesiastical Court

The person thus appointed ought
seem to be a proper person before the
Ecclesiastical Court may merely as
Trustee to the Ordinary
for the case the Ordinary was not
[illegible]

[illegible]

2 Bac. Ab. 2 Ed. 5.

2 Bac. Ab. Gwil. 3. c.

2 Bac. Ab. 13. Gwil. 3.

Gwil. 3.

[illegible] Executors [illegible]
[illegible] Probate
[illegible] Power [illegible]
[illegible] Probate [illegible]
[illegible] executorship [illegible]
[illegible] may [illegible] 20 days [illegible]
[illegible] Power [illegible]

5 Geo. IV. c. 92. s. 2. Proviso.

Executor's Refusal.

The Office of an Executor being private and personal in its nature, by the Testator's act and Appointment, by Law he may refuse to accept the Executorship on the first instance; but when Administration under Testamentary power has once been granted

2 Geo. IV. c. 8. s. 2. 11 Geo. IV. & 1 Will. IV. c. 60. s. 19.

Exec. 6

he cannot by Election be accepted before the Office through he may be compelled by Law to accept. But an Executor cannot after Letters of Administration being granted

5 Geo. IV. c. 92. s. 2. Proviso.

by Ordinary refuse to act and accept the Office, unless all the next of Kin be by Law cited to appear before the Ordinary

In

Act according to the Civil law, the Executor is [illegible] and [illegible]
[illegible] the Executor in the case [illegible]
[illegible] the Executor cannot be sued
in any action brought by the Executor
[illegible] because the [illegible] in the latter case is not
[illegible] that one of the persons
are the Executors who act, which
[illegible]

When an Executor has received [illegible]
[illegible] public act of administration
may be revoked by the Officer which determines his rights of [illegible]
[illegible]

It is remarked that whatever the Executor can with the effects of the testator
which does not interfere [illegible]
accept the office required, [illegible]
testator, so that he cannot afterwards
[illegible] to refuse a [illegible] which would

make

Exc. 3d and 4th Vic. cap.

and the Exc. cannot afterwards
discuss the effect of it unless
he has granted any license, the Exc.
is only obliged to see that the
Exc. Exc. Exc. Exc. Exc. Exc.
Exc. Exc. Exc. Exc. Exc. Exc.
Exc. Exc. Exc. Exc. Exc. Exc.

a patent office would be a nullity
[illegible] be granted of a deed that is lost
and [illegible] things, a time for which
[illegible] person be made the subject of any
limitation or restriction he cannot be
[illegible] in part then he cannot receive
a less the whole rather than the part

He cannot be removed in life of absentee
and the same rule prevails where the
[illegible] of administration granted pendente
[illegible] [illegible] was formerly doubted
whether administration could be granted
during the absence of the executor
of the testator but it is now settled that it
may be. Where the executor
is out of the realm

[illegible] No administration
may be granted while the right of ex-
[illegible] is in force. Executor
to be granted in the case of [illegible]
[illegible] [illegible]

[illegible] Grant of administration

8. If the Register having refused to receive the proofs tendered, the party may apply to the Surveyor General, who shall hear the parties & decide the matter.

9. If no claim shall be entered at the time of the immediate commencement of the settlement, a grant shall issue.

10. If any claim be entered, proof and counter proof will be received. And the Register & Receiver shall forward the proofs & allegations of the parties to the Surveyor General, who shall appoint a day for hearing the parties & their witnesses, of which he shall give notice to the Register & Receiver, & to the parties.

11. The Surveyor General shall hear the proofs & allegations of the parties & their witnesses, & decide the matter in a summary way, & his decision shall be final, unless appealed from to the President of the United States within sixty days after the same shall be rendered.

be not long prior to A. D. 1200 by the Stat.ᵉ of Merle, and 2 Inst. 238. the Stat.ᵉ of Westm. 2. 13 Edw. 1. c. 34. "De Donis conditionalibus," or the Stat.ᵉ of Glouc. 6 Edw. 1. c. 5. 2 Inst. 332. reviewed and explained by the Stat.ᵉ of 11 Edw. 1. c. 1. Merton, 20 Hen. 3. c. 8. and 52 Hen. 3. c. 23. Westm. 2. 13 Edw. 1. c. 1. Quia Emptores, 18 Edw. 1. st. 1. Bract. lib. 2. c. 16. Flet. lib. 5. c. 5. Britton, c. 66. Mirror, c. 2. § 27. Fleta, lib. 3. c. 14. § 5

[illegible]

[illegible] 20a
[illegible] 2d Ed.

[illegible] authority to the person that he can
[illegible] estate" of one with the
[illegible] intentions to be the time [illegible]
the power of one [illegible]

"Words other from the above that the
person was not a good authority [illegible]

3 Ves. 63. "But it is said even by Lord [illegible]
case Lord [illegible] that he is entitled by
[illegible] and the Ecclesiastical Judge [illegible]
"But it seems to be established that an

2 Bac. Abr.
3 Bro. 29
[illegible] 78
[illegible]
2 Ves. 203. [illegible] has not such a power
[illegible] on the effects of the deceased, as
[illegible] to have for the authority
[illegible] him and [illegible]
[illegible] that by virtue of the [illegible]
a bailiff to the infant [illegible]
the said [illegible] authority relates to
the case of an [illegible] of
[illegible]

1 Com. 261
2 Phill. 349
2 Curt. 496

can a new administration be obtained by bond
without a repeal of the first and the bond
from the sureties, his administration & all
acts must be declared void and the bond cancelled.
The administration duly obtained
may be repealed on a suggestion of inability
"de facto" as if the original Adm^r
should become a "lunatic" or otherwise
incapable of administering.

1 Com. 263.
2 Lee. 158
1 Phill. 364.
1 Hag. 394.

If the person entitled to be
liable at the intestate's death, and administration
be for this reason granted to another
person, administration must be repealed, as the
person becoming capable

Lord Ch.
v. Burn's
Eccl. Law 237
Or. Ecc. 1840.
1 Hag. 471.

Administration pendente lite may be re-
peated without a sentence of revocation,
and granting a new administration,
which is held a repeal of the former

The consequences of Repealing Administrations.

It is a general rule, that where the revocation of an administration is, that it is to no purpose unless the grant is but void to some sub-sequi. Therefore if the administration be regularly granted, that is to say, person, and be afterwards repealed on a citation by the ordinary, all the intermediate acts of the first administrator are good: as if he pays the proof of the intestate, loans out his goods, a lawful action, such as a right to a comm. mony &c. In this case if the first administrator a creditor to the intestate he may retain his own right to the satisfy his debt. But if an administration are repealed by citation made a gift of the intestate, deeds by him before the repeal of the gift is void as against executors of the late Q. Elizabeth. This was agreed the Queens case. Yet in the last case all the first administrator acts were in a manner void

1 Rep. 76. 1 Com. 96. 2nd ed.

1 Rep. 296. 2nd ed. Cro. Eliz. 460. 2 Bo. 196. 2 Inst. 390. 2 Lyn.

Dyer 38. 1 Cro. 684. 1 Com. 96. 2 Bac. 410

2 Rep. 8. 2nd ed. 50.

to

[illegible] 28
[illegible] 21

[illegible] Bac. 198.
[illegible] Bac. 198.
[illegible] Bac. 198.

Administrator and shall be sworn and
bound as the Ordinary shall appoint
and the Ordinary after
having granted Administration
as aforesaid shall direct
a Citation to be issued
to the Executor or Administrator
to bring in the Inventory
and Account of the Estate
and effects of the Deceased
and to pay the Debts
and Legacies thereof
and the Executor or Administrator
shall pay the Debts
and Legacies of the Deceased
in a due course of Administration
and shall pay the Residue
of the Estate to the Persons
entitled thereto under the
Statutes of Distribution
and the Executor or Administrator
shall be allowed all
Payments made by him
in the Premises
and shall be charged
with all Sums received
by him for the Estate
of the Deceased
and shall be allowed
all Losses
which happen
without his Fault
and shall be charged
with Interest
for all Sums
which he shall
retain in his
hands beyond
the Time
allowed by
Law for
the Payment
of Debts
and Legacies
and shall
be allowed
Interest
for all Sums
paid by him
for Debts
and Legacies
after the
Time allowed
by Law
for the

3 Pr. Wms. 130.
Prec. in Ch. 495.
2 Eq. Ca. Ab. 24.
2 Vern. 24.

At the Ecclesiastical Court, [illegible] Judge
being duly sworn, [illegible] Butler who deposed
duly to the approved [illegible] that
[illegible] as long as [illegible] unrepealed
[illegible] would in all other places and here
[illegible] considerable [illegible] the
[illegible] to be proved to be [illegible]
deed. [illegible] [illegible] [illegible]
[illegible] the [illegible] was produced to the [illegible]
and the [illegible] of the [illegible] proved
[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible] [

qualifications indeed the rule seems to be Lord 141.
inviolably observed. For if they do not
apply at all except to those cases, where the
kind of "Debt" and other relations the testa-
tor contracts and deals relating to "Debt"
as accrued in the life time of the testator.
Chapter from probate he may maintain Ex. 143
Ingrate proper Reference for injuries Yeates 3 [illegible]
done to the estate after the testator's death 2 Lab. 17
done in this case he may declare upon his 1 Esh. 2 [illegible]
own proper [illegible] Yeates 3 [illegible]
Lord 174 Lutt 1 [illegible]
2 Roc. 443
Lutt 89.
2 Bac. 421.
1 Mod 62.
Before probate he may distrain or assign
for rent due on a reversion for a term of
years, even to him from the testator and Lutt 1 302
the rent accruing after the testator's death be Lord 171.
cannot the rent accruing after the testa- 1 Mod 300.
tor's death resides in them. Yet he can- 1 Roll 421.
not do these acts of the rent accruing in 2 Mod 422.
the testator's life & before probate till 1 Com 234

2 may

1 Vern. 78. 1 Ch. Ca. 117. 2 Ch. Ca. 11 2 Ch. Ca. 29 3 Ch. Ca. 29

he may maintain "Debt" for a debt of the testator's, for how the case stands is the case of the testator.

"Debt" upon the action of "Debt" and the action in the testator's, I take it, not to be a debt due, but the Ecc. Court before probate to stay the action and in this case.

If a stranger sues for money in those cases, can release an action before probate let be ordered to retain the action 2 Ch. Ca. 227. 2 Ch. Ca. 213. 1 Ch. Ca. 111. 2 Ch. Ca. 23. 2 Ch. Ca. 28. Ley 124. claim before probate. The Bill may be dismissed before probate if any one of the executors by letter testamentary at the time of ordering when he could make proof. Else revive the subpoena [illegible]

2 Bac 395 Ed 2nd

the Defendant be found Not Guilty or
Else or without answering that he has nothing
to say If an action be brought against
several Defts and he pleads the matter
in abatement he loses the advantage of
it If one of the Defts refuse to ac-
cept a Bill tho' he must be named
and Sued in such Common and Ordi-
nary Suit The effect of Summons and Distra-
nare is to prevent the Defts from selling
and from releasing The effect of the Summons
and Severance is to take away the
Priority to Suits to make them no Priority

But if a Trespass be committed on the goods
of the Testator while in the possession of
several Defts it is a joint wrong and
Each may be sued at a Suit or Each in his
own proper right. By a contrary rule, no one
in Name of the Rest can sue for that
the possession of one is the possession of the other
in Law

Of the Grants
&c. &c. &c.

Be it enacted &c. &c. that [illegible]
[illegible] the water in any of the [illegible]
the Grants [illegible] the Grantees [illegible]
[illegible] belong to the [illegible] Grantees [illegible]

In general any contract entered into
with the Chief of the Grants will make
a stronger one &c. &c. &c. than [illegible]
can be taken for the [illegible] and can
not [illegible] be [illegible] paying debts
out of the rents received and [illegible]
[illegible] due to the Grants and in general
all acts of acquiring transferring or [illegible]
[illegible] the Chief will make a larger [illegible]
[illegible] &c. &c. &c. &c.

The value of the rights taken in the Grants
[illegible] the Mississippi [illegible]
[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]
[illegible] [illegible]

Opie v Lamb

of the Executors with whom some account to
pass in the Master's office offering for
want of Evidence to prove the Legacies to the
Children to be satisfied a Decree was
on Appeal to the Lords reversed
Lord Eldon
Opie v Lamb
merely a matter of Account between
the Executor and Legatee but
Where acts are sufficient to make an Account
to be taken is a question of Law
The rule must be this principal of Discovery
extends to the following cases
If the act of the Stranger be such as clearly
amounts to the inference that he claims
to be a Trustee and Executor of the Will
he is liable to an Account as such
Lord Eldon
Opie v Lamb
The above rule is that which will make an
Executor de son tort applies in this case that
only to cases where there is no rightful Executor
or Administrator and to those cases where

[illegible] 1 Com. Ch. 2 Vern. 190

[illegible] Equity

[illegible] 1 Eq. Ca. Abr. 2 Ld. Raym. 1571 Bunn. 171.

[illegible]

Executors.

[illegible] 2 Ves. Jun. 2 Atk. 2

[illegible] 2 Atk.

[illegible] 2 Ves. Jun. 2 Atk. 2 Ves. Jun. 2 Atk. 2

[illegible]

personal property, as I presume it is the case in a great many other cases of the kind in the United States. The case referred to by the English Lawyer is that of a tenant for life, and personal property cannot be barred in favour of remainder men there, but differences in this respect exist between the English and American Statutes of Limitations.

A debt of personal nature might be regarded by the creditor as of small value, and not worth the trouble of suit. Or the debtor might be a near relative, or a friend, whom the creditor would not like to sue. Or the debtor might be insolvent, and the creditor might wish to wait for a more favourable time. Or the debtor might be a person who would be able to defend a suit, and the creditor might not be able to do so. Or the creditor might be a person who would be able to defend a suit, and the debtor might not be able to do so.

Yours

Of Clerks, 11. [illegible]
[illegible] of Grenlers and
[illegible] Islanders.

The [illegible] of an Act [illegible] to
[illegible] and the [illegible] of all the estates
[illegible] were to apply to the Islands and to
[illegible] an [illegible] of [illegible] Justices
[illegible] with [illegible] there the [illegible]
a Bar [illegible] and record with the Court of
Pleas to the perfect [illegible] but not
[illegible] [illegible] for the [illegible] of
the [illegible] of the estate [illegible]
[illegible] the offenders [illegible] [illegible]
[illegible] on the [illegible] [illegible] by
[illegible] and [illegible] [illegible] [illegible] of the
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]

1771

with the Court of Exchequer for the arrest of the
ships. A Judge of Exchequer ought to appoint
an executor of property the title to which
is disputed for the decision cannot affect the
right of saying the title at law

The Defendant cannot take to Equity till after
Issue joined he has answered to his answer, he has made a
reasonable delay. If an Executor is about to arbi-
trate and the arbitrator award against
the payment of a certain sum he cannot
appeal in any court of equity as to that claim
if fact is after answer by having his liability
proceeded into [illegible] Court
2 Ves 155 & 2 Ves 168. 169. 170 to recover the Debt of money due from the
testator he must make the executor personally
liable. The power and duty of the Court
of Exchequer are very various the powers
are different from [illegible] in which they differ

2 Ves 155 Exchequer Bills are taken for the
testators and interest to the amount of
them after only

Effect Bond Debts

The Assignment of Debts.

The Ass[t] takes [illegible] subject to all the
certain equities in the assignment of debts &
may in all cases [illegible] general charge and
defence of opposing the Assignee

1 Debt to the Crown by Bond or Specialty
2 Debts by particular Statute or Extent
3 Debts of Record & Specialty Debts
4 Debts on simple Contract

The part of the English law very well pleased
a very correct picture of the manner in
which Contract creditors, whose claims are
for the most part [illegible] being preferred
to all others, may be compelled to their
whole debt. Debts on equal Rank, the
Court may pay which he pleases but he
cannot prefer one to the other in proportion
[illegible] to Debts which are
always payable until the latter are
an inferior nature. If the Ass[t] has had
a transfer of a Debt upon which there
does not appear to have been a

[illegible]
[illegible]
[illegible]

[illegible]

Exec[utor]'s [illegible]

[illegible] of the [illegible]
[illegible] of the [illegible]
[illegible] of the [illegible]
[illegible] of the [illegible]
[illegible] of the [illegible]

Pecuniary and Specific
Legacies

Pecuniary legacies are bequests of money
to be paid at a certain time, which are
also sometimes payable out of
Specific legacies are bequests of things
specifically [illegible] Pecuniary legacies
are applicable to the [illegible] of the estate after
sufficient [illegible] a fund out of the specific
legacies be taken for the [illegible]
the testator whose hand and seal to the
[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]
[illegible] [illegible] [illegible]

any legacy given by the will to be taken
as the amount of the legacy is taken.
If a specific legacy be lost or destroyed by
any means whatever or part the legatee to
whom it was given must bear the loss
after the payment of specific legacies
if there be not sufficient to pay all
the pecuniary legacies there must be an
average but if there be not sufficient to
pay the specific legacies they are
first paid and always preferred and there
shall be no average between them.
There are cases where pecuniary legacies
are preferred to specific legacies, these
cases where within the intention of the
testator. From all this the general rule
is that particular gifts or legacies to be
considered as specific legacies, which are
given out of the personal estate therefore such
pecuniary legacies as given to be
paid out of the proceeds of the sale
of the legatee are charged upon the
proceeds

Gentlemen

Ellard
2 Ves. 9

probable

Ambrose

Ellard
Ves. 9
Ves. 2
Ves. 9

Trial in court [illegible]

[illegible]

[illegible]

[

Form [illegible]

favored as fortunate times and that of
be doubtful whether they refer to the
time present or to some thing that is now
rendered a relation to the time to come
But it seems better that it should
refer to the testator, because it ought
to include all that he has at the time Ormond 418
of his death and as some will pass into Salt 532
that the words of the present state is con- Elm 422
strued as persons living after the making
of the will. The words heretofore used
probably in view of the growing use of this
words is hereby made to refer to the
date, at the time of making the will.

A gift to several, whereby the legacy
is made to pass jointly to them, attaches Ellis 466
right to the survivor or survivors on that
event. By a legacy for a certain thing
or a sum of money in the funds, the
thing or sum at the specified place and
at the time of the testator's death

of a certain [illegible] from the
[illegible] for payment
[illegible]

[illegible] of a pecuniary legacy, to be
[illegible] in the Testamentary Court by
a Bill in Chancery if the Legacy
charged on land or the Executor of the only one
[illegible] of Executorship &c

Pecuniary Legacies to charge real & personal Estate

A pecuniary Legacy is to be paid out of the personal Estate of the Testator & not the real unless such real Estate be expressly charged with the payment thereof

Abatement of Legacies

If pecuniary Legacies in a Will abate
& [illegible] Testator & take the same in the
proportion of Debt and Legacy
Where both the Debts and the Legacies
are paid out of charges such pecuniary
Legacies if any be abatement by the Will will
take the Specialty in the proportion that the
Assets in such case before Legacies charged on the
real estate were applied or liable for the payment
of the Debts

If

of a necessary Equation for before the said
was satisfied, the Master was afterwards
desired to enquire and examine
what the true Value of said vessels
should have been at the time of the pass-
ing such Act which Accounts were
and the Master of the Judge Certified
Upon Hearing the Petition and the
Master's Report of the Said Act effected
if the Legislature do reasonably ought to
look on the Commissioners Equation only for
a Rule of Necessary but there before the
Court, when the Petitioners may
the more fully satisfied the Legislature
commissioners or more equitable terms.
And if no necessary Equation be referred
unto the Court and the Petitioners entitled
to compensation that the true Value
to commissioners Equation the Commissioners
entitled to, that the Petitioners and
Petitioners.

The Queen v. [illegible]

Regular Sessions

[illegible] Sheriffs Court held [illegible]
2 Hy [illegible] Mayor [illegible] Esqrs
[illegible] Recorder [illegible]
[illegible] Sheriffs [illegible]

[illegible]

2 Def.

Dist. Instrument

Plan of a scheme of relief and injunction between the Representatives claiming to create a distribution of the personal property

Recital of the Statute of 22 & 23 Charles II. which directs the application of the forfeited estates, and the unknown share of the Crown, that go to the children and their representatives in representation as in cases of intestacy, beyond sea children and Widow's children.

The Distributors have the management of the estates of deceased persons, to such time as the Court shall think fit, subject to determine who are the next of kin entitled out in the Statute of Distributions

The Distributors shall in the first place out of the intestate's assets and effects pay and satisfy all such debts as the intestate owed at the time of his death, and also the funeral charges and the charges of proving the will or taking out administration, and all such debts as shall be owing from the intestate's estate

property. But the separation of the one
[illegible] take from only wife those and
brothers and sisters over children
living. In the distribution of personal
property no distinction is made between
the whole and the half blood, the Civil
Law which regulates the distribution
regarding property and not quality
of blood. If a father of a person deceased
be living the mother takes nothing, in
case whatever she might take, were
her husbands. If after the decease of the
father and mother "a person is a minor
child" by Parliament for all purposes
even the son the father and mother
being alive and it is doubted whether
the mother would be entitled to any
thing or not. But as the father might be
for personal property in case in this
case it would seem that a fortiori
she would have a good claim.
If the person were only "a person" or
then

Ref. to 203 Steph. 71 Act. 195 & 82

Ref. to

Rule [illegible]

[illegible] she could not claim any share of the personal property of her children while her husband was living because the husband might by his marital rights dispose of it as he pleased during his life time and the wife could not prevent him from doing so. [illegible] the husband died the wife was entitled to a share of the personal property of her children. The Probate according to the statute of Distributions takes place of the Orphans Court

Rule 22d Feb. 1841

[illegible] Court in the distribution of the personal estate of children in cases of minority and the Civil as well as the Common Law considered as being in case and capable of taking property according to the rules of descent and distribution: and in favour of such an infant an injunction may be granted to stay Waste.

2 Vern. 396.
7 Ves. 95.
3 Ves. 486.

Case 2nd John Stile died leaving a wife and three children

Answer One third goes to the wife and the remaining two thirds goes to the children each taking a third.

Case 3rd John Stile died leaving a wife but three children

Answer The estate is divided per capita among the children

Case 4th John Stile leave two children and the one a third, the one himself being dead.

Answer The two children take each one third and the grand child the one remaining one third it representing the father.

Case 5th John Stile died leaving a child A. his child A. died who left a child B. and his child B. died leaving child how left?

Answer In this case B the child of John Stile take per being issue of the deceased

The Rules of Descent

& his grandchild take, another third being the legal representation of his father & mother & the other third is divided between the children of A. so his representatives per representation take per stirpes, and not per capita"

Case 2th A. and his three children are dead but A leaves a child B. C. leaves E. and F. and D. leaves G. H. and I.

Answer The old stock being extinct, the representation ceases, and I give the children of A. B. and D. take per capita all standing in the same degree.

Case 6th A. died having two children B. and C. his child B. is dead and has a child D. who leaves E. and F.

Answer. The children B. and C. take each ½ and D. and E. the remaining ½ as representatives of their grandfather A.

Case 7th A. left a wife but no issue his father Theodore & another brother

Both

Case 5th and Sixth

to the one sister of the whole blood
Tom Dick and Sally of the half blood
Jane Silla and Susan Jane and his
uncle George and Edmund Stiles.
- Answer The wife take 1/2. half of the
estate according to the Stat. there being
children and the father the other half
Case. 6th The only relations living are
Tom Dick and Sally brother and sister
of the whole blood Jane Stile and Ed-
mund Stile the half blood brother and
sister and his Uncle George and Ed
mund Stile
- Answer The brother and sister of the
whole blood and also of the half take
the estate per capita in relation of
the Uncle; they being in the second
who is the Uncle and in the third de-
gree of kindred
Case 7th The same case as the last
only Jane and George are dead with-
out issue and so it rests as before but

left

Case 1st and Rule 3d

Left no children

Answer Dick and Sally are entitled to ⅔ being the part of him & the deceased & the children of Tom, entitled to the other third being the legal representative of his brother Tom

Case 2d If the brother and sister of the whole blood only survive but no children of Tom survive & leaves the children of Dick & Sally

Answer In this case Sally takes ⅔ of the estate as next of kin & the legal representatives of Tom another third and Dick's children being the representatives of Dick

Case 3d If the whole brother and sister are dead Tom left children Dick left children & Sally dies

Answer In this case the distributees being stock representation ceases and therefore Jack & Harriet George and Tom's children together with the children of Dick and Sally divide the estate per capita

Louisa

[illegible]

Answer Here she is to [illegible]
[illegible]

Question Where she is to [illegible]
[illegible] the rest of his [illegible] the estate
[illegible] estate?

Case 2nd The deceased 2nd [illegible]
a dead [illegible] [illegible]

Answer Here she is to [illegible] take the
whole estate in exclusion of the children
[illegible] because [illegible] relations
[illegible] no portion from the [illegible]

Case 3rd She is dead leaving [illegible]
one [illegible] dead leaving [illegible]
& leaving [illegible] leaving [illegible]
and [illegible] leaving [illegible]

Answer She takes the whole estate
[illegible] of him & the [illegible] of the other
[illegible] follows [illegible]

Case 4th [illegible] dead leaving [illegible]

Answer In this case the children [illegible]

Estate of Nicholas Dobson

[illegible] and [illegible] made the estate [illegible] being [illegible] of [illegible] to the [illegible]

Question 2nd Was any [illegible] left [illegible] George Left [illegible] and [illegible] left [illegible]

Answer The children of George and [illegible] were [illegible] the estate with those of [illegible] the [illegible] and [illegible] by being all in the same degree.

Question 3rd The only relation living at the death, was [illegible] grandfather Dobson and [illegible] brother Tom.

Answer According to the general rule Solomon and Tom would divide the estate equally: but this case [illegible] an exception and Tom inherit the whole estate in preference to the grandfather Solomon

Question 4th Tom Dobson died leaving his grandfather Solomon his brother Tom and his [illegible] Thomas.

Answer [illegible] Tom [illegible] Thomas [illegible] the [illegible] [illegible]

[illegible]

entitled, to whose name he may, in the first instance, and pass the certificate to an equal share with him [illegible]

Second. The said [illegible] the said [illegible] for the [illegible] and [illegible] [illegible] [illegible]

Exec[r] and Adm[r]

be sued at law by them to recover their
debts that the Exec[r] or Adm[r] is liable for the
debts but not for the debts of the testa-
tor or intestate for neither have made
themselves such; & still true. The Exec[r]
or Adm[r] stands in such privity to the
testator or intestate that whatever is re-
covered or recovered against the Exec[r] or Adm[r]
in the action of the party aggrieved has
been given by the testator or intestate
whereby it appears that the damages
ought not to be assessed twice & both times
been benefitted: but whether or not they
have enjoyed by the testators or

If Exec[r] or Adm[r] of Exec[r] or Adm[r] was
sued & liable for any debt committed by
their testator or intestate & the present
plaintiff & Exec[r] and Adm[r] of Exec[r]
upon the equity of the Stat. of 4 Edward

Hill.

Case Land Law

Debtors &c. to lands vested in
testators. In the 21 & 22 Vict.
cap. 26 sect. 3 the word debtor is used but
the word in the previous Statute is lands
Quere does this Statute enable a Creditor
on Vic. to merely give him a right to
action &

Where a right of recovery for the benefit of
the testator or intestate accrues against
the Vic. & cannot however the action
brought agt the latter, a new cause of action
in fact but is continued and the same
right of recovery & remedy which
cannot be traversed

If an action which would accrue against
an Vic. be brought agt the testator and
he latter die pending the suit the ac-
tion does not abate. If in this case the
action be such as would not survive
against a state. If therefore an action
be brought agt an Vic. and the action
depends on how the suit may occur

Cons. 22 Vict. 3 Wms. Saund. 6th ed. 312 a. Reg. Gen. Hilary Term 1853 Sect. 32.

Case [illegible]

[illegible] of favorable [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]

Exec[r] and Adm[r]

Stry[t] for
Exec[r] &
Adm[r]

Exec[r] &c. Where a Testator by his Will appoints
his Executor & gives a Pecuniary Legacy
to such Executor

Where the Executor & Legatee
are the same Person

it is a general Rule that a Person cannot
sue for any part of the Estate and
plead ne unques Executor

but there are some things which will be
presumed to be by which he to the Executor
& Legatee even where neither the Testator
nor he knew it, as to the Testator, but if the Testator
had been bound they would have sued the
Exec[r] & he would have pleaded
Ne unques Executor & Legatee
Executorship
& Legacy
merged

accordingly personal property goes to the
Heir where no part appears at the Death of
the Testator to be with the Assets & the
Exec[r] the right of the Executor of an
Intestate person to take the Assets
Executorship
& Legacy
merged

goes to the Exec[r]
Executorship & Residuary Legacy are merged

Exec^r and Adm^r

between a widow and servant here and
Exec^r Certain estates are by the
custom of London & Yorkshire transmitted to the
eldest male heir & descend and are called Burgh-English
If a testator or intestate die possessed
for 61. 12. of a term for years it belongs to the Exec^r or Adm^r
If a lease for years come to the hands of
the Exec^r he never essentially adds
to the Inventory the value of the profits
if any after allowing for payment of rent
and the rule is the same with respect to
all accruing profits
If the testator covenant for & make a lease
the rent on his death goes to his
Exec^r in reversion & never distant of time
are real assets in the hands of the heir
for m. 25. and Execution may go against them accordingly to be levied when they shall descend
Equities of Redemption in
the Mortgagee of testate are in Exec^r

To the real estate in the hands of the Exr to Descend as Land

At the latest period at which debts may be recovered the Executor is liable to the extent of the Assets that may come to his hands

If the testator by Mortgage or Bond or otherwise charged the estate with the payment of a Sum of Money at a certain time after his death & died seized of the Equity of Redemption

The heir alone in this case can be compelled to foreclose & he will pay the money due on the land is pledged, but not otherwise

that species of personal property called Paraphernalia regularly do not go to the Exr or Exrs The first kind of Paraphernalia never vests in the Exr The second vests on Assent of personal rep. The subject has been discussed under a similar head

Vide Title Executors

Exec[r] and Adm[r]

Bonds.

The Adm[r] must give bond for the
faithful discharge of his trust and the
Ex[rs] are compellable by the court to
give caution & security they being
trustees. So bond can be taken
before he is Ex. pay debts and the rea-
son assigned is, that before that he can
not give bonds.

It seems to be the case that there is a
case required of an Ex[r] &c. they are
binding notwithstanding the provision
of the Stat. Law.

If the Adm[r] do not account or if he
make a false account and not account
he forfeit his bond.

But the non-payment of debts &c
related no forfeiture

for with debts a forfeiture

Qui[e] coronat. &c.

William Ld

C. Ca. 374
Carth. 454
2 Ld Ray. 1386
Show. 274.

1 Ch. Ca. 94.
2 Roll. Rep. 121.
Cro. Car. 173.
Sid. 96.
2 Lev. 238.

Fitz. Ju.
Bro. Ab. 119.
5 Rep. 31
2 Roll. Rep. 167
Bro. Exr. 55

Exr.

Reeve
and
Goulds
Lectures

W. Bond

I